

A Delicate Balancing Act: Satisfying the Fourth Amendment While Protecting the Bankruptcy System from Debtor Fraud

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Since the Middle Ages, bankruptcy laws have been concerned with preventing and deterring fraudulent debtors, most notably debtors who willfully fail to fully disclose all of their assets to their creditors. This concern was no less prevalent during the passage of the first Bankruptcy Act in the United States in 1800, which established bankruptcy fraud as a criminal offense. No doubt, the evolution of modern American bankruptcy law has moved toward a more liberal treatment of debtors. Significantly, so long as debtors conform to certain behavioral norms prescribed in the Bankruptcy Code, honest, but unfortunate debtors can expect to receive a discharge of their pre-petition indebtedness. Notwithstanding the existing civil and criminal remedies for committing bankruptcy fraud through a failure to disclose assets, it is suspected that many individuals who file for bankruptcy protection attempt to improperly shield assets from their creditors' reach. Consequently, this Article proposes a normative framework under which a bankruptcy trustee can conduct a warrantless search of an individual debtor's residence upon suspicion that a debtor is attempting to commit fraud by failing to disclose assets. More specifically, this Article argues that a bankruptcy trustee, though bound by the Fourth Amendment, can conduct a warrantless search of a debtor's home based upon one of three distinct theories: (1) the bankruptcy process can be considered a "special needs" administrative search exception to the Fourth Amendment warrant requirement; (2) the bankruptcy law system can be equated to a "closely regulated industry" under Fourth Amendment jurisprudence; and (3) debtors implicitly consent to have their homes searched by a bankruptcy trustee as a consequence of submitting themselves to the intrusive nature of the bankruptcy process.

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To them the fraudulent debtor was always an actuality; they knew that no celestial city would ever descend with him absent; and so the same old thing was required of every debtor as the price of the new privileges, namely, full submission to the court.

Garrard Glenn, 1936¹

Introduction

Since the dawn of the twentieth century, American consumer bankruptcy law has been predicated on two foundational principles: first, providing an individual debtor with a "fresh start" in life, free and unhampered by pre-existing indebtedness; and second, providing the various creditor constituencies with an equitable distribution of the debtor's available assets.² The second of

1. Garrard Glenn, *Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor*, 23 VA. L. REV. 373, 387 (1936).

2. See Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 515-16 (1991) ("The essence of our consumer bankruptcy law is the discharge. The discharge of a consumer debtor frees the debtor from the shackles of existing debt and places him on the economic treadmill once again—to earn, consume and borrow." (citing Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 51 (1986))); Hallinan, *supra*, at 50 ("One firmly established tenet of time-worn bankruptcy lore holds, of course, that the bankruptcy system serves two functions: the protection and payment of creditors; and the provision of shelter and a 'fresh start' to overburdened debtors." (citing *Kokoszka v. Belford*, 417 U.S. 642, 645-46 (1974))); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) ("The principle advantage bankruptcy offers an individual lies in the benefits associated with discharge. Unless he has violated some norm of behavior specified in the bankruptcy laws, an individual who resorts to bankruptcy can obtain a discharge from most of his existing debts in exchange for surrendering either his existing nonexempt assets or, more recently, a portion of his future earnings." (citing 11 U.S.C. §§ 701-766 (1979))); George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L.J. 325, 325 (1997) ("Bankruptcy law is grounded upon the public policy of freeing the honest, but unfortunate, debtor from the financial burdens of perpetration indebtedness and thereby allowing the debtor to make an unencumbered fresh start." (citing *U.S. Dep't of Health & Human Servs. v. Smith*, 807 F.2d 122, 123-24 (8th Cir. 1986))); see also *Kokoszka*, 417 U.S. at 645-46 (noting that it is the "twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched" (citing *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913))).

these principles is entirely subverted when individual debtors fraudulently conceal the extent of their assets available for distribution—a potentially serious problem in the present bankruptcy law system. Accordingly, this Article is concerned with enhancing the powers bankruptcy trustees have at their disposal to detect and to expose such fraud. More specifically, this Article argues that in an effort to prevent the fraudulent concealment of assets from distribution to creditors, bankruptcy trustees should be empowered to conduct warrantless searches of debtors' homes without running afoul of the Fourth Amendment.

While many, if not most, individual debtors file for bankruptcy protection with honest intentions, there is also an underside to the current American bankruptcy system that often goes unreported and ignored in the scholarly literature: namely, the commission of fraud by debtors who seek protection under the Bankruptcy Code. Almost a century ago, F. Regis Noel astutely recognized in his work, *A History of the Bankruptcy Law*, the existence of two classes of debtors in society—the truly unfortunate and the fraudulent—which, in his view, warranted “different regulations” and complicated the bankruptcy system.³

Indeed, bankruptcy law has been concerned with preventing and deterring the fraudulent debtor since at least the Middle Ages.⁴ For example, England promulgated the first Anglo-bankruptcy law in 1542 during the reign of King Henry VIII,⁵ and its primary purpose was not the rehabilitation of debtors, but the prevention of fraud by debtors upon their creditors.⁶ The subsequent English bankruptcy statutes treated debtors as criminal felons and moral failures.⁷ The harshness of these bankruptcy proceedings, and the brutal treatment of debtors prior to the late nineteenth century in England and the

3. F. REGIS NOEL, *A HISTORY OF THE BANKRUPTCY LAW* 7 (1919).

4. 8 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 229 (1926) (noting that the distinction between an honest but unfortunate debtor and a fraudulent debtor took root in the Italian commercial cities of the Middle Ages); cf. Gregory E. Maggs, *Consumer Bankruptcy Fraud and the “Reliance on Advice of Counsel” Argument*, 69 AM. BANKR. L.J. 1, 11 (1995) (“Because bankruptcy debtors have the most to lose from the smooth functioning of these laws, they have throughout history faced the temptation to thwart the process by concealing or giving away their property.”).

5. 8 HOLDSWORTH, *supra* note 4, at 236. This first bankruptcy law was officially titled, “An Act against such persons as do make bankrupts.” Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995).

6. 8 HOLDSWORTH, *supra* note 4, at 236. This Act specifically recounted the common occurrence of debtors, who after “craftily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their debts and duties, but at their wills and pleasures consume the substance obtained by credit of other men” Bankruptcy Act 1542, 34 & 35 Hen. VIII, c. 4 (1542) (Eng.).

7. Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 227 (1976) (“The bankrupt who did not honestly surrender up his property and disclose his affairs was, under this law, to be ‘adjudged a fraudulent bankrupt’ and a felon.”); see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 199 (3d ed. 2005) (“Bankruptcy originally had a quite punitive ring. It was at one time a crime, later a disgrace.”).

United States, are well documented.⁸ Not only were debtors liable for imprisonment for debt, but a penalty of pillory “and the loss of an ear” could also be imposed upon a debtor “who failed to show that bankruptcy was due solely to misfortune.”⁹ In addition to the power to punish, the English bankruptcy statutes empowered commissioners to investigate whether debtors were concealing assets.

The first U.S. bankruptcy law, passed in 1800,¹⁰ “had as its conceptual origin the English bankruptcy system familiar to the Framers of the United States Constitution.”¹¹ Much like its English antecedents, the Bankruptcy Act of 1800 established bankruptcy fraud as a criminal offense at a time when jails were overflowing with imprisoned debtors in the various states.¹² As the nineteenth century progressed, however, legislators in both England and the United States began to recognize a moral distinction between fraudulent debtors, on the one hand, and those individuals who had succumbed to financial calamity through life’s misfortunes, on the other.¹³ The subsequent American bankruptcy acts, enacted in 1841, 1867, and 1898, moved slowly but surely in the direction of the liberal treatment of debtors. The modern Bankruptcy Code, enacted in 1978,¹⁴ is now considered by many to be a pro-debtor statute.

To be sure, “the attitude towards and the treatment of delinquent debtors have been subjected to significant changes since the days of torture and slavery under the Roman law and the days of pillory and imprisonment under English

8. See PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900* (1974); BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2002); Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153 (1982); Vern Countryman, *Bankruptcy and the Individual Debtor—and a Modest Proposal To Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809 (1982); Countryman, *supra* note 7; Ian P. H. Duffy, *English Bankrupts, 1571-1861*, 24 AM. J. LEGAL HIST. 283 (1980); Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160 (1991); Glenn, *supra* note 1; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991) [hereinafter Tabb, *Bankruptcy Discharge*]; Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) [hereinafter Tabb, *Bankruptcy Laws*]; Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189 (1938).

9. Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 17 (1919).

10. Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

11. *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 949 (9th Cir. 2002); see also DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 90 (2001) (“The Bankruptcy Act of 1800 was derived from English law, as were parts of the 1841 and 1867 acts . . .”); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 13 (1935) (noting that the initial bankruptcy bill introduced in the United States closely followed the English Bankruptcy Act); Tabb, *Bankruptcy Laws*, *supra* note 8, at 6-7 (“The first United States bankruptcy law, passed in 1800, virtually copied the existing English law.”).

12. WARREN, *supra* note 11, at 22; see also Countryman, *supra* note 7, at 228 (noting that “the colonies and then the states had carried over the English system of imprisonment for debt and only some of the states had insolvency laws which would give the debtor a discharge or at least a release from jail”).

13. Tabb, *Bankruptcy Discharge*, *supra* note 8, at 338.

14. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

law.”¹⁵ Today, the “enlightened approach” is to afford honest but unfortunate debtors an opportunity to free themselves from the burden of debt through the bankruptcy discharge.¹⁶ Despite the pro-debtor focus of the current Bankruptcy Code, however, the potential for debtors to commit fraud, “keep house,”¹⁷ or otherwise conceal assets from the bankruptcy process remains a concern; the reported cases are rife with examples of debtors attempting to hide or shield assets from their creditors.¹⁸

Beginning in 1996 and continuing to the present, well over one million individuals have filed for consumer bankruptcy protection each year.¹⁹ Moreover, since 1989 through the present, more than 90% of all bankruptcy

15. Charles Seligson, *Major Problems for Consideration by the Commission on the Bankruptcy Laws of the United States*, 45 AM. BANKR. L.J. 73, 78 (1971).

16. *Id.*

17. The concept of “keeping house” refers to the act of a debtor who intentionally seeks refuge in his or her home for the purpose of avoiding creditors and civil process. *See* Cohen, *supra* note 8, at 155; Frimet, *supra* note 8, at 163; *see also* Treiman, *supra* note 8, at 194 (“This was the notorious practice of ‘keeping house,’ by which a debtor, protected by the sanctified English maxim that a man’s house is his castle, would betake himself to his home and there consume his creditors’ goods, utterly immune to forcible intrusion by legal process.” (citing Israel Treiman, *Escaping the Creditor in the Middle Ages*, 43 L.Q. REV. 230, 233-34 (1927))).

18. *See, e.g.*, *United States v. Wagner*, 382 F.3d 598 (6th Cir. 2004) (convicting under the criminal law for concealing an asset from the bankruptcy trustee); *Vill. of San Jose v. McWilliams*, 284 F.3d 785 (7th Cir. 2002) (denying debtor’s discharge after attempting to transfer property prior to commencing bankruptcy); *United States v. Cluck*, 143 F.3d 174, 176 (5th Cir. 1998) (“Thus, before invoking the power of Title 11, he perceived that it might be useful to keep some Jaguars in reserve, some money within easy access, and, maybe, just for good measure, a few of his favorite things beyond the reach of his creditors and the bankruptcy court.”); *United States v. Christner*, 66 F.3d 922 (8th Cir. 1995) (convicting debtor under 28 U.S.C. § 152 for concealing approximately \$36,000 from the bankruptcy proceeding); *Boroff v. Tully (In re Tully)*, 818 F.2d 106 (1st Cir. 1987) (denying debtor’s discharge for failing to disclose significant assets in the bankruptcy process); *Stegeman v. United States*, 425 F.2d 984 (9th Cir. 1970) (convicted debtors of violating 18 U.S.C. § 152 after fraudulently transferring certain assets to third parties before the institution of an involuntary bankruptcy proceeding against them); *United States v. Shapiro*, 101 F.2d 375 (7th Cir. 1939) (convicting debtor of concealing money from the bankruptcy trustee); *Youngman v. Bursztyn (In re Bursztyn)*, 366 B.R. 353 (Bankr. D.N.J. 2007) (finding that debtor attempted to conceal approximately \$250,000 worth of assets from the bankruptcy proceeding); *United States Tr. v. Gardner (In re Gardner)*, 344 B.R. 663 (Bankr. M.D. Fla. 2006) (denying debtor’s discharge for failing to disclose his interest in a corporation); *Jeffrey M. Goldberg & Assocs. v. Holstein (In re Holstein)*, 299 B.R. 211 (Bankr. N.D. Ill. 2003) (denying debtor’s discharge for fraudulently concealing assets from the bankruptcy court); *Roudebush v. Sharp (In re Sharp)*, 244 B.R. 889 (Bankr. E.D. Mich. 2000) (denying debtor’s discharge for intentionally concealing assets from the bankruptcy court); *Banc One, Tex., N.A. v. Braymer (In re Braymer)*, 126 B.R. 499 (Bankr. N.D. Tex. 1991) (denying debtor’s discharge after exhibiting a pattern of behavior to hide assets from her creditors); *United States v. Conner*, 25 F. Cas. 595 (C.C.D. Mich. 1845) (indicting debtor under criminal law for failing to disclose certain assets in the bankruptcy proceeding). This list serves as an illustration and is not exhaustive.

19. *Annual Business and Non-Business Filings by Year (1980-2009)*, AM. BANKR. INST. <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=60229> (last visited Apr. 15, 2011). In 2006 and 2007, however, nonbusiness bankruptcy filings reached only 597,965 and 822,590, respectively, largely as a result of the overwhelming number of individuals filing for bankruptcy protection prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act on October 17, 2005. The shortfall in both 2006 and 2007 was made up during 2005, when over two million individuals filed for consumer bankruptcy protection. *Id.*

petitions filed in the country represent individual consumer debtors.²⁰ These figures are significant because the Department of Justice had long suggested that fraud is committed in approximately 10% of all civil bankruptcy cases.²¹ Although difficult to provide any empirical data on the reach of bankruptcy fraud, it has been estimated that bankruptcy fraud costs creditors, the federal government, and local governments approximately one billion dollars a year.²² Simply using the suggested percentage provided by the Department of Justice means that approximately one-hundred thousand separate acts of bankruptcy fraud are committed by consumer debtors each year, amounting to about 1.5 million instances of bankruptcy fraud since 1996.²³ Moreover, one empirical study conducted a decade ago revealed disturbing results.²⁴ According to the study, debtors failed initially to disclose 38% of their collective assets eventually administered in the Chapter 7 cases, and 41% of the cases had undisclosed assets.²⁵

At present, the bankruptcy laws provide two mechanisms to redress fraudulent conduct: civil and criminal.²⁶ On the civil front, if a debtor is suspected of committing bankruptcy fraud, including concealing assets from the bankruptcy court, the Bankruptcy Code provides two remedies. First, the bankruptcy court or the bankruptcy trustee could seek to dismiss the bankruptcy case;²⁷ second, the bankruptcy trustee or one of the creditors could

20. *Id.* The term “consumer debtor” is used to refer to an individual who chooses to file for bankruptcy protection under either Chapter 7 or Chapter 13 of the Bankruptcy Code. *See* 11 U.S.C. § 101(8) (2006). This term is consistent with the definition of “consumer debt” in the Bankruptcy Code as any “debt incurred by an individual primarily for a personal, family, or household purpose.” *Id.*; *see also* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 403 (1994) (noting that the most basic choice for a consumer contemplating filing for bankruptcy relief is to choose between Chapter 7 or Chapter 13 of the Bankruptcy Code).

21. Craig Peyton Gaumer, *A Call to Arms: How Can the Department of Justice Better Combat Bankruptcy Crimes?*, 18 AM. BANKR. INST. J. 8, 8 (1999).

22. Sharon Walsh, *Bankruptcy Fraud Rises as Debtors Hide Assets*, WASH. POST, July 13, 1991, at A1, A9.

23. On or about April 7, 2009, the U.S. Trustee Program reported that based upon its recent audit of Chapter 7 and Chapter 13 bankruptcy cases, 21% of the 1276 cases audited during fiscal year 2008 contained a “material misstatement” or an indication that the audit produced information that “challenged the accuracy, veracity, or completeness of a debtor’s petition, schedules, or other filed bankruptcy documentation.” *See Debtor Audits: USTP Findings*, BANKR. CT. DECISIONS, Apr. 7, 2009, at 6; *see also* Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 469 (1997) (opining that “the number of dishonest debtors receiving discharges is substantial”).

24. *See* Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 AM. BANKR. L.J. 653 (1999) (describing the results of an empirical study performed on the initial filings in two hundred randomly chosen consumer bankruptcy cases filed in the first half of 1998 in the U.S. Bankruptcy Court for the Eastern District of Michigan); Steven W. Rhodes, *A Preview of “Demonstrating a Serious Problem with Undisclosed Assets in Chapter 7 Cases,”* 5 NORTON BANKR. L. ADVISOR 1 (2002) [hereinafter Rhodes, *A Preview*].

25. Rhodes, *A Preview*, *supra* note 24, at 1.

26. Nevin M. Gewertz, *Act or Asset? Multiplicitous Indictments Under the Bankruptcy Fraud Statute*, 18 U.S.C. § 152, 76 U. CHI. L. REV. 909, 912 (2009) (“Bankruptcy laws provide two means of redress for fraudulent concealment of assets: civil and criminal.”).

27. 11 U.S.C. § 707(b) (2006).

attempt to object to the debtor's discharge.²⁸ On the criminal front, if a debtor "knowingly and fraudulently" (1) conceals assets from the bankruptcy proceeding; (2) makes a "false oath or account" in a bankruptcy case; or (3) makes a "false declaration" in connection with a bankruptcy case, 18 U.S.C. § 152 makes any one of these actions a crime punishable by fine or by imprisonment for up to five years, or both.²⁹

The available civil and criminal remedies addressing bankruptcy fraud, though seemingly powerful, are less effective in practice.³⁰ While the singular purpose of filing for bankruptcy protection is to receive a discharge of indebtedness, which results in the extinguishment of personal liability on the debt,³¹ a denial of a discharge leaves the debtor in no worse of a position vis-à-vis creditors than before filing for bankruptcy protection.³² In other words, after a denial of discharge, the existing creditors remain empowered to collect their debts from the debtor in personam.³³ As for the remedy of criminal punishment, it is no secret that institutional resources for prosecuting instances of bankruptcy fraud "are limited, and resulting prosecutions of bankruptcy fraud alone are few and far between."³⁴

Notwithstanding the possibility of facing both civil and criminal remedies for committing bankruptcy fraud, "many persons who file for relief choose to try to cheat the system."³⁵ The potential for abuse is exacerbated because once

28. *Id.* § 727(c)(1).

29. 18 U.S.C. § 152 (2006).

30. See *Bankruptcy Fraud: A Roundtable Discussion*, 6 AM. BANKR. INST. L. REV. 275, 279 (1998) (noting that actions to deprive a debtor of his or her discharge fail to deter attempts at fraud); James M. Cain, *Proving Fraud in Credit Card Dischargeability Actions: A Permanent State of Flux?*, 102 COM. L.J. 233, 256 (1997) (observing that the withholding of a discharge is often an empty threat to debtors whose lack of assets removes any fear of civil remedies); Luther Zeigler, Note, *The Fraud Exception to Discharge in Bankruptcy: A Reappraisal*, 38 STAN. L. REV. 891, 917 (1986) (arguing that the penalty of nondischargeability is not an effective penalty for debtor fraud).

31. *In re Hawkins*, 377 B.R. 761, 766 (Bankr. S.D. Fla. 2007) (noting that a Chapter 7 discharge "voids all of the debtor's personal liability on a debt" (citing *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991))).

32. Gewertz, *supra* note 26, at 912 ("Significantly, however, civil penalties impose no greater penalty than the original debt itself. If successful in his fraudulent act, the debtor retains the value of any concealed assets[] if caught, the debtor remains in no worse position relative to his creditors." (citing Zeigler, *supra* note 30, at 911)); see also Ralph C. McCullough, *Bankruptcy Fraud: Crime Without Punishment II*, 96 COM. L.J. 257, 284 (1991) ("Demanding that a debtor restore to the estate assets he has appropriated will help make up what has been stolen, but it leaves the debtor no worse off than he would have been had he originally surrendered the assets. He risks nothing by attempting to hide assets that may later be recovered.").

33. *IRS v. Cousins (In re Cousins)*, 209 F.3d 38, 41 (1st Cir. 2000) ("The debtor remains personally liable, however, for any nondischargeable debts." (citing Marvin E. Jacob & Jacqueline B. Stuart, *The Search for Balance in Bankruptcy: Congress Debates Bankruptcy Overhaul as Consumer Bankruptcies Rise*, 116 BANKING L.J. 369, 377 (1999))).

34. Gewertz, *supra* note 26, at 931 (citing McCullough, *supra* note 32, at 258); see also Gregory E. Maggs, *Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument*, 69 AM. BANKR. L.J. 1, 7 (1995) (noting that prosecutions for bankruptcy fraud "have been fairly rare").

35. Craig Peyton Gaumer, *The Hazard of Concealing Assets in Bankruptcy*, 22 AM. BANKR. INST. J. 8, 8 (2003). Indeed, Gregory Maggs acknowledged this reality well over a decade ago:

a bankruptcy petition is filed there is no real mechanism by which the bankruptcy trustee or the court can positively check the accuracy of the information provided by the debtor in the bankruptcy petition and accompanying schedules. In other words, the present bankruptcy system is “essentially one of self-reporting.”³⁶ As presently constituted, the Bankruptcy Code “relies on a debtor to make a complete, full, and honest disclosure of all required information.”³⁷ As Lynn M. LoPucki has observed, though the present bankruptcy system mandates an investigation of every debtor’s financial affairs, it does not, and practically cannot, happen in actuality.³⁸

These deficiencies with the current consumer bankruptcy system indicate that a bankruptcy trustee should be afforded an additional measure toward uncovering fraudulent conduct, namely, the ability to search a debtor’s home for the concealment of assets. Notably, a distinction must be drawn between the honest, but unfortunate, debtor, and the debtor who is “unable” or unwilling to repay creditors as a result of resorting to fraudulent machinations.³⁹ This Article focuses on this latter category of debtors. Such a suggested remedy, however, “involves significant issues regarding the intersection of a bankruptcy trustee’s statutory duties under the Bankruptcy Code and the application of the Fourth Amendment.”⁴⁰

At present, only two reported decisions have squarely addressed the issue of a bankruptcy trustee’s authority to search a debtor’s residence and the concomitant need to comply with any Fourth Amendment restrictions.⁴¹ Both decisions permitted the bankruptcy trustee to search the debtors’ homes, but only after the trustee first applied to the court for a search order.⁴² As will be discussed below, these decisions do not go far enough in enabling a bankruptcy

Consumer debtors frequently attempt to cheat the bankruptcy system by devising ways to hide their property or income from the bankruptcy trustee, thereby keeping it from their creditors. Most schemes require little imagination or cunning. Some debtors give their property to relatives prior to filing a bankruptcy petition. Others lie or fail to make a full disclosure about what they own or earn in documents submitted in court. Whatever the technique, the debtor’s goal is always to obtain a discharge at the least possible personal cost The debtor does not need a law degree to figure out that the bankruptcy trustee assigned to the case will not be able to distribute to creditors any property or money that the trustee does not know about and cannot find. Some debtors, as a result, simply lie on their bankruptcy schedules.

Maggs, *supra* note 34, at 3.

36. McCullough, *supra* note 32, at 295.

37. Yoppolo v. Sayre (*In re Sayre*), 321 B.R. 424, 427 (Bankr. N.D. Ohio 2004); *see also* United States v. McIntosh, 124 F.3d 1330, 1334 (10th Cir. 1997) (noting that in a bankruptcy proceeding, the duty to disclose assets falls upon the debtor).

38. LoPucki, *supra* note 23, at 476.

39. *See* 8 HOLDSWORTH, *supra* note 4, at 229 (noting that the bankruptcy laws of England in the seventeenth century attempted to make this distinction).

40. Youngman v. Bursztyn (*In re Bursztyn*), 366 B.R. 353, 355 (Bankr. D.N.J. 2007).

41. *See In re Bursztyn*, 366 B.R. at 353; Taunt v. Barman (*In re Barman*), 252 B.R. at 403 (Bankr. E.D. Mich. 2000).

42. *See In re Bursztyn*, 366 B.R. at 353; *In re Barman*, 252 B.R. at 403.

trustee to carry out the task of investigating the financial affairs of a consumer debtor.

The purpose of this Article is to propose a normative framework under which a bankruptcy trustee can conduct a warrantless search of a debtor's residence upon suspicion that a debtor is attempting to commit fraud by failing to disclose assets to the bankruptcy court. Part I of this Article begins with a brief, contextualized overview of the consumer bankruptcy process. Part II then examines whether a bankruptcy trustee is a state actor for purposes of the Fourth Amendment and answers this question in the affirmative. Part III discusses the two reported cases on this issue: *Taunt v. Barman (In re Barman)*⁴³ and *Youngman v. Bursztyn (In re Bursztyn)*.⁴⁴ Part IV advances the thesis of the Article, namely, that a bankruptcy trustee, though bound by the Fourth Amendment, can conduct a warrantless search of a debtor's home based upon the following three distinct theories: (1) that the bankruptcy process is a "special needs" administrative search exception to the Fourth Amendment warrant requirement; (2) that the bankruptcy law system can be equated to a "closely regulated industry" under Fourth Amendment jurisprudence; and (3) that debtors implicitly consent to have their homes searched by a bankruptcy trustee based upon the intrusive nature of the bankruptcy process along with the trustee's statutory duties to investigate the financial affairs of the debtor.

I. The Consumer Bankruptcy Process, the Discharge, and the Fresh Start

Individuals contemplating filing for bankruptcy protection can generally choose to file for Chapter 7, Chapter 13, or Chapter 11. The ultimate decision of selecting a particular chapter of the Bankruptcy Code largely depends upon the debtor's financial status and the significance of the debtor's assets. The scope of this Article encompasses the Chapter 7 and Chapter 13 bankruptcy processes because Chapter 11 filings usually come with a presumption that individual case trustees will not be appointed to oversee and direct the distribution of assets and the allocation of creditors' rights.⁴⁵

By far, the most common type of bankruptcy case for individuals is a liquidation proceeding governed by Chapter 7 of the Bankruptcy Code.⁴⁶ Once a Chapter 7 bankruptcy petition is filed,⁴⁷ the Bankruptcy Code mandates that a

43. *In re Barman*, 252 B.R. at 403.

44. *In re Bursztyn*, 366 B.R. at 353.

45. See generally 11 U.S.C. §§ 1104-1107 (2006) (setting forth circumstances under which a trustee may be appointed and terminated in a Chapter 11 proceeding, the duties of the trustee, and the rights of the debtor in possession).

46. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 1.23 (2d ed. 2009) ("A Chapter 7 liquidation bankruptcy case is the norm. The majority of all bankruptcy filings, over 60%, are liquidation bankruptcies under Chapter 7."); see also 11 U.S.C. §§ 701-784.

47. The commencement of a bankruptcy case is usually a voluntary act by the debtor. However, the Bankruptcy Code provides for the involuntary filing of a bankruptcy petition against a

bankruptcy trustee be appointed to serve in the case.⁴⁸ The primary function of a bankruptcy trustee in a Chapter 7 proceeding⁴⁹ is to collect and liquidate “property of the estate”⁵⁰ that is otherwise not exempt from the bankruptcy process. Subsequently, the trustee distributes any proceeds from the liquidation to creditors in accordance with the priority scheme set forth in the Bankruptcy Code.⁵¹

During the pendency of the bankruptcy case, creditors are enjoined, or “stayed,” from any attempts to collect their claims from the debtor or from the bankruptcy estate.⁵² In exchange for relinquishing any nonexempt assets to the bankruptcy trustee for liquidation, the Chapter 7 debtor is permitted to retain post-petition earnings free from the claims of the pre-bankruptcy creditors.⁵³ The goal of a consumer debtor in a Chapter 7 bankruptcy proceeding is to obtain a discharge of pre-petition indebtedness,⁵⁴ which, as noted previously, results in the extinguishment of the debtor’s in personam liability for the debt.⁵⁵

In contrast to Chapter 7, Chapter 13 of the Bankruptcy Code “permits individual debtors to restructure and repay debt through repayment plans and to obtain a discharge and retain assets in consideration of paying their disposable income to creditors under a plan which is supervised by a trustee.”⁵⁶ During the course of the Chapter 13 case, the automatic stay prevents creditor collection

debtor, if certain conditions are met. See 6 COLLIER ON BANKRUPTCY ¶ 700.02 (16th ed. 2010); see also 11 U.S.C. § 303(b).

48. See 11 U.S.C. §§ 701-702.

49. See generally *id.* § 704 (specifying duties of the trustee).

50. Upon the filing of a bankruptcy petition a mythical bankruptcy “estate” is created that is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” *Id.* § 541(a)(1).

51. *In re Tarrant*, 349 B.R. 870, 875 (Bankr. N.D. Ala. 2006) (“A ‘Chapter 7 trustee’s duty is to reduce to money the legal or equitable interests owned by the debtor in these various assets so that the proceeds may be distributed to unsecured creditors in accordance with Section 726.” (citing *In re Talbert*, 268 B.R. 811, 819 (Bankr. W.D. Mich. 2001))).

52. See 11 U.S.C. § 362 (specifying ways in which a bankruptcy filing operates as a stay of creditor collection efforts).

53. *Id.* § 541(a)(6) (including in property of the estate “[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case”); see also TABB, *supra* note 46, § 1.1 (“An individual debtor thus may keep his future earnings for himself, free from the claims of his pre-bankruptcy creditors.”).

54. *Edwards v. Sieger (In re Sieger)*, 200 B.R. 636, 638 (Bankr. N.D. Ind. 1996) (“The goal of all bankruptcy legislation is to achieve a just and equitable distribution of the estate to the creditors and to relieve the honest debtor of his debts, giving him a fresh start.” (quoting *In re Epstein*, 39 B.R. 938, 941 (Bankr. D.N.M. 1984))).

55. Notably, “a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.” *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).

56. 2 NANCY C. DREHER & JOAN N. FEENEY, BANKRUPTCY LAW MANUAL § 13:1 (5th ed. 2009); see also *In re McCollum*, 348 B.R. 377, 393 (Bankr. E.D. La. 2006) (“As part of the deal a debtor makes with his or her creditors when electing to file under chapter 13, as opposed to chapter 7, the debtor retains all pre-petition property in exchange for committing all post-petition disposable income to the payment of creditors under a plan of reorganization.” (citing *In re Burgie*, 239 B.R. 406, 410 (B.A.P. 9th Cir. 1999); *In re Golek*, 308 B.R. 322, 338 (Bankr. N.D. Ill. 2004))).

efforts while a plan of repayment is developed and thereafter approved by the court.⁵⁷ In a Chapter 13 bankruptcy case, the Chapter 13 “standing trustee” serves as the principal administrator in the proceeding.⁵⁸ “Unlike the Chapter 7 trustee, the Chapter 13 trustee does not sell the debtor’s nonexempt property. Instead, the Chapter 13 trustee’s main function is to collect a debtor’s plan payments and make payments to creditors in accordance with the Chapter 13 plan.”⁵⁹ That said, however, like the Chapter 7 trustee, the Chapter 13 trustee is also charged with the responsibility of investigating the financial affairs of the debtor and opposing the discharge of the debtor if warranted.⁶⁰ The Chapter 13 trustee, like its Chapter 7 counterpart, has the responsibility of investigating the debtor’s financial affairs. But unlike the Chapter 7 trustee, the Chapter 13 trustee “does not take possession or liquidate property of the estate, except with respect to money collected for the purpose of making distributions to creditors under a plan.”⁶¹

The proverbial fresh start is accomplished through the discharge of most of the debtor’s pre-petition indebtedness.⁶² The linchpin of the consumer discharge is that the debtor must demonstrate forthrightness and honesty throughout the bankruptcy proceeding, including in the disclosures and financial information provided in the bankruptcy petition and accompanying schedules.⁶³ Indeed, the granting of the discharge is not an absolute right but is dependent upon the ingenuous dealings of the debtor.⁶⁴ Accuracy, honesty, and

57. 2 DREHER & FEENEY, *supra* note 56, § 13:1.

58. *Id.* § 13:9.

59. *Id.*

60. See 11 U.S.C. § 1302(b)(1) (2006).

61. 2 DREHER & FEENEY, *supra* note 56, § 13:9.

62. In perhaps the most cited recitation of the fresh start principle, the U.S. Supreme Court stated in *Local Loan Co. v. Hunt*:

One of the primary purposes of the Bankruptcy Act is to ‘relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.’ This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

292 U.S. 234, 244 (1934) (citing *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915)); see also *U.S. Dep’t of Health & Human Servs. v. Smith*, 807 F.2d 122, 123 (8th Cir. 1986) (“The bankruptcy laws embody a congressional policy to free an honest debtor from his financial burdens and thus to allow him to make an unencumbered fresh start.”).

63. See *In re Slentz*, 157 B.R. 418, 420 (Bankr. N.D. Ind. 1993) (“Since the proper operation of the bankruptcy system depends, to a large extent, upon debtors honestly and forthrightly completing the schedules and statements which are filed with the court, attempts at cheating cannot be made to appear too attractive.”).

64. See *In re Williams*, 286 F. 135 (W.D.S.C. 1921) (“The granting of a discharge is not an absolute right, existing at the time of the filing of a petition in bankruptcy, but is dependent on the square dealings and honest purpose of the bankrupt, as evidenced by his acts and doings after the filing of his petition.”).

complete disclosure by the debtor are critical to the functioning of the bankruptcy system and are “inherent in the bargain for the discharge.”⁶⁵ To this end, unless the individual debtor violates a proscribed form of behavior contained within the Bankruptcy Code or developed through federal bankruptcy law,⁶⁶ an individual who files for bankruptcy relief can ordinarily obtain a discharge from the majority of pre-petition debts in exchange for surrendering any nonexempt assets.⁶⁷

The types of prohibited conduct that would lead to a denial of the discharge can manifest in the debtor’s behavior either leading up to the bankruptcy filing or during the bankruptcy proceeding itself. For example, a court may deny a debtor’s discharge if the debtor: (1) transferred or concealed any property from the bankruptcy process so as to defraud any creditor;⁶⁸ (2) transferred or destroyed property within one year before the filing date with the intent to hinder, delay, or defraud a creditor;⁶⁹ (3) transferred or destroyed “property of the estate”⁷⁰ after the bankruptcy petition was filed;⁷¹ (4) concealed, destroyed, mutilated or falsified any financial documents;⁷² (5) made a false oath or presented a false claim in connection with the bankruptcy case;⁷³ or (6) failed to obey any lawful order of the bankruptcy court.⁷⁴ Quite significantly, debtors who transgress prohibited behavioral norms, fail to perform their duties in the bankruptcy case, or abuse the bankruptcy process itself will be unable to discharge their pre-petition debts.⁷⁵

II. Bankruptcy Trustees and State Action

Before addressing whether a bankruptcy trustee possesses the authority to search a debtor’s home, a preliminary inquiry must be made into whether a bankruptcy trustee is even bound by the dictates of the Fourth Amendment.⁷⁶

65. *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 149 (4th Cir. 1996) (citing *In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974)).

66. *See generally* 11 U.S.C. § 727(a) (2006) (enumerating the types of conduct warranting a denial of the Chapter 7 discharge); *id.* § 1328(a) (outlining the parameters of the discharge in a Chapter 13 case).

67. *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985).

68. 11 U.S.C. § 727(a)(2).

69. *Id.* § 727(a)(2)(A).

70. Section 541(a) of the Bankruptcy Code defines “property of the estate” as “all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case.” *See id.* § 541(a)(1).

71. *Id.* § 727(a)(2)(B).

72. *Id.* § 727(a)(3).

73. *Id.* § 727(a)(4).

74. 11 U.S.C. § 727(a)(6)(A).

75. *Royal Am. Oil & Gas Co. v. Szafranski (In re Szafranski)*, 147 B.R. 976, 981 (Bankr. N.D. Okla. 1992).

76. *See* U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants

To be sure, the Fourth Amendment “is applicable only to governmental activity; it does not regulate private searches and seizures.”⁷⁷ That is, the Fourth Amendment is inapplicable to “a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.”⁷⁸ It follows, therefore, that if there is no governmental intrusion, the Fourth Amendment is simply not implicated.⁷⁹ A bankruptcy trustee, however, occupies a gray area “between the extremes of overt governmental participation in a search and the complete absence of such participation.”⁸⁰ This situation exists because a bankruptcy trustee possesses characteristics of both a private and a governmental actor. As such, the determination of whether the Fourth Amendment applies to a bankruptcy trustee is not absolutely free from doubt.

While de minimis or incidental contacts between a private party and a governmental agency or law enforcement official will not create the necessary nexus for constitutional purposes, if the government is “involved either directly as a participant or indirectly as an encourager of the private citizen’s actions,”⁸¹ then the private actor will be deemed to be an instrument of the state under the Fourth Amendment.⁸² In general, courts ask the following two questions prior to deciding that a sufficiently close nexus exists to implicate the Fourth Amendment: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or to further the party’s own needs.⁸³

Prior to the enactment of the Bankruptcy Code in 1978, “all the administrative aspects of bankruptcy, including the appointment of trustees, were performed by the judiciary.”⁸⁴ For various reasons, including a fear that

shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

77. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 4 (2008).

78. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)); *see also* *United States v. Jones*, 31 F.3d 1304, 1309 (4th Cir. 1994) (“The Fourth Amendment protects this reasonable expectation of privacy against government intrusion. It has long been established that the security provided by the Fourth Amendment against unreasonable search and seizure applies solely to government intrusions.”); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (“A wrongful search or seizure by a private party does not violate the Fourth Amendment.”); *United States v. Ellison*, 469 F.2d 413, 415 n.2 (9th Cir. 1972) (“Where the search and seizure is by private persons not assisted by or arranged for by the police, the Fourth Amendment does not apply.”).

79. *Jones*, 31 F.3d at 1309.

80. *Walther*, 652 F.2d at 791.

81. *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982).

82. *United States v. Richardson*, 607 F.3d 357, 364 (4th Cir. 2010).

83. *See* *United States v. Snowadzki*, 723 F.2d 1427, 1430 (9th Cir. 1984); *see also* *United States v. Soderstrand*, 412 F.3d 1146, 1153 (10th Cir. 2005) (adopting the same two-part inquiry); *United States v. Parker*, 32 F.3d 395, 398 (8th Cir. 1994) (“Two critical factors in assessing whether a private party acts as an agent of the government are (1) the government’s knowledge of and acquiescence in the search, and (2) the intent of the party performing the search.”).

84. 1 *COLLIER ON BANKRUPTCY* ¶ 6.01 (16th ed. 2009).

the bankruptcy courts would fail to appear impartial to the public and to the participants in the process, Congress created the U.S. Trustee Program to oversee the administration of the bankruptcy laws in the United States.⁸⁵ The Department of Justice, indisputably an agency of the United States,⁸⁶ created the U.S. Trustee Program,⁸⁷ which is under the supervision of the U.S. Attorney General.⁸⁸ The Attorney General, through the Executive Office for United States Trustees, is charged with appointing one U.S. Trustee for each of the twenty-one regional federal districts across the country.⁸⁹ Pursuant to the strategic plan published by the U.S. Department of Justice, the U.S. Trustee Program is described as a “high-performance, litigating component of the Department of Justice with growing capacities to fulfill its mission, including combating fraud and abuse in the bankruptcy system.”⁹⁰ In turn, the twenty-one U.S. Trustees are responsible for executing the U.S. Trustee Program, which, in part, “acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system.”⁹¹

Each of the twenty-one U.S. Trustees who are supervised by the Attorney General⁹² (and the Office of the United States Trustee) has a statutorily prescribed list of duties—the most significant of which for present purposes is that each individual U.S. Trustee “shall establish, maintain, and supervise a panel of *private trustees* that are eligible and available to serve as trustees”⁹³ in Chapter 7 bankruptcy cases.⁹⁴ Thus, in each district the U.S. Trustee appoints a number of individuals to serve as Chapter 7 trustees in the bankruptcy cases that are filed in that geographical region.⁹⁵ These “panel trustees” serving in the

85. *Id.*

86. 28 U.S.C. § 501 (2006) (establishing the Department of Justice as an executive department of the U.S. government).

87. The Bankruptcy Reform Act of 1978 established the U.S. Trustee Program. *See* Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1529 (9th Cir. 1994).

88. 28 U.S.C. § 581 (establishing the U.S. Trustees).

89. *Id.* § 581(a).

90. U.S. TRUSTEE PROGRAM, U.S. DEP’T OF JUSTICE, STRATEGIC PLAN FY 2005-2010, available at http://www.justice.gov/ust/co/ust_org/StrategicPlanFY2005-2010.pdf; *see also* 28 C.F.R. § 0.1 (2010) (describing the Department of Justice as consisting of several “principal organizational units,” including the Executive Office of the U.S. Trustees).

91. U.S. TRUSTEE PROGRAM, U.S. DEP’T OF JUSTICE, FY2011 BUDGET REQUEST (2010), available at <http://www.justice.gov/jmd/2011justification/pdf/fy11-ustp-justification.pdf>.

92. 28 U.S.C. § 586(c).

93. *Id.* § 586(a)(1) (emphasis added).

94. Chapter 7 bankruptcy cases are the most common type of bankruptcy case filed across the country. TABB, *supra* note 46, § 1.1. In a Chapter 7 bankruptcy proceeding, otherwise known as a “liquidation,” the debtor’s existing and available assets are sold and the net proceeds are distributed to creditors in accordance with the priorities established by the Bankruptcy Code. *Id.*

95. 1 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 6.01[2][b] (“Cases generally are assigned to trustees in blind rotation.”).

individual bankruptcy cases are predominantly, if not always, private parties, usually “an attorney or accountant engaged in private practice.”⁹⁶

Consequently, these private attorneys and accountants serving as trustees in each bankruptcy case would be the persons seeking authority to search a debtor’s home for potentially concealed assets. This scheme can cause confusion for the federal courts. To be sure, the Office of the United States Trustee considers the panel trustees to be private parties and not governmental employees.⁹⁷ Furthermore, the federal courts have held that a bankruptcy trustee is not an officer or employee of the U.S. government.⁹⁸ At the same time, however, once appointed, a bankruptcy trustee is under the supervision and direction of the bankruptcy court⁹⁹ and is sometimes afforded derived judicial immunity because the trustee “is performing an integral part of the judicial process.”¹⁰⁰ Thus, as a result of the construction of the U.S. Trustee Program, an individual panel trustee “possesses characteristics of the executive branch, judicial branch, and of a private party.”¹⁰¹ This amalgamation of traits raises the ultimate issue of whether a private trustee’s conduct can be sufficiently attributed to governmental action so as to implicate a debtor’s Fourth Amendment privacy interests.

The two reported decisions to confront this issue in the context of a search of a debtor’s residence, *Taunt v. Barman (In re Barman)*¹⁰² and *Youngman v. Bursztyn (In re Bursztyn)*,¹⁰³ both concluded that bankruptcy trustees represent a sufficiently close nexus to the government so as to bring their actions under the scrutiny of the Fourth Amendment. As the *In re Barman* court held, while a bankruptcy trustee is a private actor, “every aspect of a trustee’s position and function is subject to either statutory obligation or to federal executive or judicial branch control.”¹⁰⁴ That is, a bankruptcy trustee is appointed and supervised by an official of the Department of Justice, namely, the U.S.

96. See *Youngman v. Bursztyn (In re Bursztyn)*, 366 B.R. 353, 365 (Bankr. D.N.J. 2007); see also *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 230 (Bankr. E.D. Va. 2002) (“The trustee is an attorney, as are most other Chapter 7 panel trustees.”).

97. *In re Bursztyn*, 366 B.R. at 365.

98. *Cromelin v. United States*, 177 F.2d 275, 277 (5th Cir. 1949); see also *Wells v. United States*, 98 B.R. 806, 810 (N.D. Ill. 1989) (noting that a bankruptcy trustee is not under the control of the United States).

99. See *In re Med. Sterile Prods.*, 310 F. Supp. 262, 264 (D.P.R. 1970) (citing *Lincoln Nat’l. Life Ins. Co. v. Scales*, 62 F.2d 582 (5th Cir. 1933)).

100. *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir. 1986); see also *Balser v. Dep’t of Justice*, 327 F.3d 903, 910 (9th Cir. 2003) (noting that private trustees “were protected by quasi-judicial immunity, because some ‘acts [in bankruptcy proceedings] which taken out of context would appear ministerial . . . are actually part of the judicial function’” (quoting *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 952 (9th Cir. 2002))).

101. *In re Bursztyn*, 366 B.R. at 365.

102. *Taunt v. Barman (In re Barman)*, 252 B.R. 403 (Bankr. E.D. Mich. 2000).

103. *In re Bursztyn*, 366 B.R. at 353.

104. *In re Barman*, 252 B.R. at 412.

Trustee.¹⁰⁵ In addition, the proximate government nexus is further indicated by the fact that the Attorney General of the United States is charged with the responsibility of prescribing “qualifications for membership on the panels” of private trustees that are in turn established by the regional U.S. Trustees.¹⁰⁶

Moreover, it is the Office of the Attorney General and the Office of the United States Trustee, a division of the Department of Justice, that dictate the policy objectives of the U.S. Trustee Program, which every bankruptcy trustee is bound to follow. In protecting the integrity of the bankruptcy system, one of the Department of Justice’s asserted goals is to “[e]nforce compliance with federal bankruptcy laws and take civil actions against parties who abuse the law or seek to defraud the bankruptcy system.”¹⁰⁷ To that end, the manual for U.S. Trustees encourages panel trustees to bring any evidence of fraud or misconduct to the attention of the U.S. Trustee, who in turn must refer such matters to the appropriate U.S. Attorney.¹⁰⁸

Admittedly, the U.S. Trustee does not ordinarily direct a panel trustee’s decisions in a particular Chapter 7 case.¹⁰⁹ Despite this, it is sensible to conclude that the government is involved indirectly as a participant in the consumer bankruptcy process, directing or sponsoring a panel trustee’s actions in a particular bankruptcy case. Thus, the conduct of a bankruptcy trustee is sufficient state action to implicate the Fourth Amendment. Interestingly enough, however, while a bankruptcy trustee seems to be bound by the Fourth Amendment, and thus, the trustee’s conduct amounts to that of a government actor under the Fourth Amendment, a bankruptcy trustee does not necessarily need to request a warrant prior to searching a debtor’s home.

III. Prior Court Decisions Addressing the Intersection Between Bankruptcy Law and the Fourth Amendment

To date, only two reported decisions have squarely addressed the question of whether a bankruptcy trustee can conduct a search of a debtor’s home and its

105. *Id.* (citing 11 U.S.C. § 701(a) (2006); 28 U.S.C. §§ 581, 586(a)(1), 586(a)(3), and 586(c) (2006); and 28 C.F.R. § 58.4 (2010)); *Shaltry v. United States*, No. 95-15340, 1995 WL 866862, at *5 (9th Cir. June 26, 1995).

106. See 28 U.S.C. § 586(d)(1) (“The Attorney General shall prescribe by rule qualifications for membership on the panels established by United States trustees under paragraph (a)(1) of this section, and qualifications for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11.”).

107. See U.S. TRUSTEE PROGRAM, U.S. DEP’T OF JUSTICE, LEGAL MANUAL FOR UNITED STATES TRUSTEES 38-39 (1988), available at http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol11-1988AUG-general.pdf.

108. 18 U.S.C. § 3057(a) (2006) (“Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.”).

109. 1 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 6.11.

related intersection with the Fourth Amendment. Both decisions authorized a search of a debtor's home, albeit only after the bankruptcy trustee obtained a warrant from the court.¹¹⁰

The first reported bankruptcy court decision to tackle directly the intersection of bankruptcy law and the Fourth Amendment is *In re Barman*.¹¹¹ In that case, Norman Barman filed a Chapter 7 petition;¹¹² in his schedules accompanying the bankruptcy petition, Barman listed "wearing apparel worth \$500" as his only asset.¹¹³ However, Barman was apparently engaged in a scheme to place personal property beyond the reach of creditors and to purchase parcels of real property in the names of others in order to avoid liability to his own creditors. Upon learning of this plan, the bankruptcy trustee filed a complaint against Barman, alleging in part that he "fraudulently transferred funds to his wife . . . for the purchases of [various] homes" and concealed assets belonging to the bankruptcy estate.¹¹⁴ In addition, the trustee sought to revoke Barman's discharge.¹¹⁵

Contemporaneous with the filing of the complaint, the bankruptcy trustee filed an ex parte motion for an order authorizing the trustee to enter Barman's home "and to inspect, inventory and appraise personal property."¹¹⁶ The trustee premised the need to request ex parte relief on the belief that "the debtor would attempt to conceal assets at the home if given advance notice,"¹¹⁷ based upon "the [d]ebtor's previous violation of a bankruptcy court order . . . and his experience in moving assets in a variety of situations."¹¹⁸ The bankruptcy court granted the motion.¹¹⁹

110. Although beyond the scope of this Article, the ability of a bankruptcy trustee to obtain a search warrant from a bankruptcy court is not free from doubt. See generally *In re Application of Tr. in Bankr. for a Search Warrant*, 173 B.R. 341 (N.D. Ohio 1994) (finding that the trustee had not "shown that he has the authority to apply for the issuance of a search warrant"); *Spacone v. Burke (In re Truck-A-Way)*, 300 B.R. 31 (E.D. Cal. 2003) (finding that a bankruptcy trustee is not authorized to seek a search warrant under FED. R. CRIM. P. 41).

111. *Taunt v. Barman (In re Barman)*, 252 B.R. 403 (Bankr. E.D. Mich. 2000).

112. *Id.* at 407.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *In re Barman*, 252 B.R. at 411.

118. *Id.* at 409.

119. *Id.* at 407. In particular, the trustee's application to the court provided as follows:

The Trustee's counsel was informed, on December 17, 1999 that the Debtor had a trailer at his residence . . . that contained personal property of the Debtor and/or the Debtor's wife. This information was provided to the Trustee by a party that is involved with post-petition business litigation involving the Debtor and persons/entities related to the Debtor In addition to the existence of the trailer, the Trustee was informed that according to what was witnessed at the residence, including the condition of the house and the existence of a mobile home near the premises, it appeared that the Debtor and his family may be moving from that residence. The Trustee has expedited the filing of both an adversary proceeding against the Debtor and related parties and this motion to avoid the likely irreparable harm to the bankruptcy estate in light of the Debtor's history of flight and defiance of previous bankruptcy court orders.

Following the subsequently authorized search, Barman attempted to suppress the evidence obtained by the bankruptcy trustee during the search of his home on the grounds that the search violated his rights against unreasonable searches and seizures under the Fourth Amendment.¹²⁰ For many of the reasons expressed in Part II of this Article, the *In re Barman* court first concluded that a bankruptcy trustee has a sufficiently close nexus “to government and its power” that makes it “necessary and appropriate to apply to the trustee the fourth amendment limits on government power.”¹²¹ Using this conclusion as a platform, the court then considered the nature and scope of a debtor’s expectation of privacy for Fourth Amendment analysis and purposes. The bankruptcy court observed that debtors have a “significantly reduced expectation of privacy” in their homes.¹²² According to the court, this reduced expectation of privacy “is a natural consequence of the substantial and detailed disclosures that are inherent in the bankruptcy process.”¹²³

Despite this conclusion, however, the bankruptcy court did not go so far as to hold that debtors have no reasonable expectation of privacy in their homes or personal property upon filing for bankruptcy relief.¹²⁴ For the *In re Barman* court, three considerations militated against such a finding. First, the court noted “that unlike the written and filed disclosures that are available to the public by law, an inspection of a debtor’s home is not open to the public.”¹²⁵ Second, the court observed that “nothing in the Bankruptcy Code states or implies an obligation upon a debtor to permit an inspection by a trustee without a court order.”¹²⁶ That is, “[n]either the obligation to file written disclosures nor the obligation to appear at the creditors’ meeting relates at all to an inspection of a debtor’s residence by the trustee.”¹²⁷ Third, the court held that although the Bankruptcy Code causes the debtor’s property to be brought into the bankruptcy estate upon the filing of a bankruptcy petition, the estate’s interest in the property “is quite limited, both in time and in function, and the debtor retains a substantial practical and beneficial interest in that property even while it is temporarily property of the estate.”¹²⁸

After determining that a bankruptcy trustee is bound by the Fourth Amendment and that debtors in bankruptcy possess a reduced expectation of privacy in their residences, the *In re Barman* court then defined the specific protections to which a debtor in bankruptcy is still entitled under the Fourth

Id. at 409.

120. *Id.* at 410.

121. *Id.* at 412-13.

122. *Id.* at 414.

123. *In re Barman*, 252 B.R. at 414.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 415.

Amendment.¹²⁹ Without much, if any, explication of why it chose to do so, the *In re Barman* court adopted the ultimate dictate of *Camara v. Municipal Court* into the bankruptcy context,¹³⁰ holding that a bankruptcy trustee needs to secure a search warrant prior to searching a debtor's home for concealed assets.¹³¹ The court did not consider the possible constitutionality of a warrantless search.

As the *In re Barman* court conceded, experience "demonstrates that in carrying out the trustee's obligations under the Bankruptcy Code, the trustee may need to inspect a debtor's residence for property of the estate."¹³² Significantly, and again as the court recognized, "such a need may arise when, as here, the trustee has reason to believe that there are undisclosed assets to be administered for the benefit of the estate."¹³³ The court further observed that bankruptcy trustees may have no way to fulfill the statutory obligation to account for all of the property of the estate without an inspection of a debtor's residence.¹³⁴ To this end, the *In re Barman* court concluded that as a result of a debtor's obligation to disclose all assets and to cooperate with the bankruptcy trustee as a condition for receiving a discharge of indebtedness, a search of a debtor's home may be "a crucial part of the process and therefore a matter of substantial need."¹³⁵

Ultimately, in balancing the public need for the proper administration of the bankruptcy process against the disruption caused to a debtor by a residence search, the court sided with the ability of a bankruptcy trustee to search a debtor's home, albeit after first obtaining a warrant from the court and complying with the following procedures.¹³⁶ First, the bankruptcy trustee must file a written motion requesting an inspection order,¹³⁷ setting forth the facts establishing a reason to believe that there is property of the estate on the

129. *In re Barman*, 252 B.R. at 415.

130. *See* *Camara v. Mun. Ct.*, 387 U.S. 523 (1967) (holding that the Fourth Amendment requires a warrant for administrative searches by municipal health and safety inspectors).

131. *See In re Barman*, 252 B.R. at 417. The *In re Barman* court held in this regard: "The Court also concludes that a procedure for an inspection order in bankruptcy would be an ordinary part of the judicial and administrative processes of bankruptcy. Indeed, allowing trustees to perform inspections without a court order would be 'out of place.'" *Id.* (quoting *Wyman v. James*, 400 U.S. 309, 324 (1971)). *But see* *Spacone v. Burke (In re Truck-A-Way)*, 300 B.R. 31, 38 (E.D. Cal. 2003) (expressing in dicta strong disagreement with the *In re Barman* court's interpretation of a bankruptcy court's authority under the Fourth Amendment).

132. *In re Barman*, 252 B.R. at 416.

133. *Id.* (citing *In re Washington*, 232 B.R. 814, 815 (Bankr. S.D. Fla. 1999)).

134. *Id.* at 417.

135. *Id.*

136. *See id.* at 418.

137. The *In re Barman* court called such a request an "inspection order." *Id.* at 411. However, there is no appreciable difference between this and a search warrant for purposes of investigating the constitutionality of such a procedure. *Cf.* *United States v. Kone*, 591 F. Supp. 2d 593, 608-09 (S.D.N.Y. 2008) ("The Government's argument fails, however, because the Order, unlike a Fourth Amendment warrant, did not necessarily issue upon a *finding* of probable cause. Although the Order was not labeled a 'warrant,' nomenclature is not dispositive." (quoting *Milner v. Duncklee*, 460 F. Supp. 2d 360, 378 (D. Conn. 2006))).

premises to be inspected.¹³⁸ Second, the trustee should ordinarily provide the debtor with notice of the motion and the debtor should generally be offered an opportunity to respond.¹³⁹ Third, the motion should seek to conduct the search during regular business hours, in the debtor's presence, and without forcible entry.¹⁴⁰ Fourth, the contemplated order must identify the premises to be inspected.¹⁴¹ Fifth, and finally, any warrant granted by the court should not authorize the seizure of any property, only the inspection, inventory, and appraisal of such property.¹⁴²

Barman argued against the use of the warrant insofar as it failed specifically to describe the property that constituted the object of the search, thereby analogizing the authorization to a "general warrant."¹⁴³ The *In re Barman* court rejected this argument, stating that "such a restriction would unduly compromise the trustee's ability to carry out his statutory obligations and potentially reward the dishonest or sloppy debtor."¹⁴⁴

Although the *In re Barman* court did not address the ability of a bankruptcy trustee to conduct a warrantless search of a debtor's home, the decision is nevertheless significant to the thesis advanced here in several respects. First, the court recognized that by filing for bankruptcy relief, debtors experience a *significantly reduced expectation of privacy* in their homes, which society is prepared to consider reasonable.¹⁴⁵ This observation undergirds the application of bankruptcy law to the "special needs" exception to the warrant requirement. As will be discussed in detail in Part IV, the Supreme Court created an exception to obtaining a warrant prior to a search by governmental actors when "special needs," beyond those of routine law enforcement activities, "make the warrant and probable-cause requirement impracticable."¹⁴⁶ Second, the *In re Barman* decision observed that in order to fulfill the statutory obligation to investigate the financial affairs of the debtor, a trustee may need to inspect a debtor's residence if there is reason to believe the debtor is hiding

138. *In re Barman*, 252 B.R. at 418. According to the court, such a motion "must set forth these facts in a detailed fashion so that the court can make an independent judgment" on the matter. *Id.*

139. *Id.* The court did, nonetheless, recognize the prospect for an ex parte motion. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 418-19. The court noted that "[i]f the trustee seeks to take actual possession of any property, presumably the trustee will follow the established procedures for such a seizure, which may involve an injunction." *Id.* (citing FED. R. BANKR. P. 7001(7) and 7065).

143. *Id.* at 418.

144. *In re Barman*, 252 B.R. at 419. For a critique of the *In re Barman* decision, see A. Mechele Dickerson, *Can the "Public Interest" Justify Non-Consensual Searches of Homes in Bankruptcy Cases?*, 11 WM. & MARY BILL RTS. J. 267 (2002); and Jennifer Taylor, *Some Bargain: How Bankruptcy Courts May Now Require a Debtor To Relinquish Expectations of Privacy as a Condition of the Bankruptcy Bargain*, 56 HASTINGS L.J. 609 (2004).

145. *In re Barman*, 252 B.R. at 414.

146. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

assets from the bankruptcy process.¹⁴⁷ Thus, the argument that a bankruptcy trustee should be authorized to search a debtor's home should not appear outlandish. Indeed, if the findings of the aforementioned empirical study that 41% of filed bankruptcy cases involve debtors attempting to conceal assets from the bankruptcy process are accurate and can be extrapolated to reflect national bankruptcy filings, then the need for a bankruptcy trustee to search a debtor's home for concealed assets is a matter of serious concern. Third, the court, in the application of its balancing test, concluded that the public interest in full disclosure by debtors in the bankruptcy system outweighs the privacy interests of any single debtor.¹⁴⁸ As will be discussed in Part IV, this finding is significant. It lends support to the argument advanced here that bankruptcy law can be reasonably equated to a "special needs" exception to the Fourth Amendment. This is true insofar as the national interest in ensuring that debtors collectively comply with the mandates of the Bankruptcy Code outweighs the privacy interests of any individual debtor.

Approximately seven years after the *In re Barman* decision, another court dealt with a similar question in *Youngman v. Bursztyn (In re Bursztyn)*.¹⁴⁹ In *In re Bursztyn*, Miriam Bursztyn filed a voluntary petition for bankruptcy relief under Chapter 7 of the Bankruptcy Code.¹⁵⁰ On her bankruptcy petition, Bursztyn listed as her only assets a bank account, some costume jewelry, nominal household goods and clothing, a claim against her former husband, and two used luxury vehicles.¹⁵¹ Significantly, the debtor answered "none" on the inquiry as to whether she owned any pictures or other objects of art.¹⁵² Furthermore, on her "Statement of Financial Affairs,"¹⁵³ Bursztyn answered "none" to a series of questions asking whether she had parted with any personal property, either voluntarily or involuntarily, during the period of time preceding the filing of her bankruptcy petition.¹⁵⁴

During the course of the bankruptcy trustee's investigation into Bursztyn's financial affairs, the trustee obtained two written judicial decisions rendered in the debtor's ongoing state court divorce proceedings that belied the disclosures that she made on her bankruptcy petition and accompanying

147. See *id.* at 416.

148. See *id.* at 417-18.

149. *Youngman v. Bursztyn (In re Bursztyn)*, 366 B.R. 353 (Bankr. D.N.J. 2007).

150. *Id.* at 355.

151. *Id.* at 356.

152. *Id.*

153. *Id.* at 356. As part of the bankruptcy petition, all consumer debtors are required to complete a "statement of the debtor's financial affairs," which provides a summary of the debtor's financial history, transactions, and operations over certain periods of time before the commencement of the case. 11 U.S.C. § 521(a)(1)(B)(iii) (2006); see FED. R. BANKR. P. 1007.

154. *In re Bursztyn*, 366 B.R. at 356. As all consumer debtors must, Bursztyn certified the responses and representations made in her bankruptcy petition and accompanying schedules under penalty of perjury. *Id.*

schedules.¹⁵⁵ Apparently over the course of their marriage, the Bursztyns acquired a significant art collection comprised of lithographs, photographs and original paintings.¹⁵⁶ Moreover, the debtor's former husband had also given her many pieces of fine jewelry.¹⁵⁷ During her matrimonial trial, Bursztyn claimed to be no longer in possession of any artwork or jewelry.¹⁵⁸ Both the state trial court and state appellate court, however, found Bursztyn to lack credibility on the issue. Using the developed factual record, both courts believed that Bursztyn remained in possession of the jewelry and artwork.¹⁵⁹

Based upon these investigative findings, the trustee applied ex parte to the bankruptcy court for an order authorizing entry into Bursztyn's residence "with the assistance of the U.S. Marshals Service, her counsel, and an appraiser to search for, seize, and appraise estate property located within the residence."¹⁶⁰ After evaluating the trustee's request, the bankruptcy court entered an order permitting the bankruptcy trustee, her counsel, an appraiser, and representatives of the U.S. Marshals Service to enter Bursztyn's residence during normal business hours to search for, seize, and appraise the uncovered assets, namely, artwork and jewelry.¹⁶¹ The trustee subsequently uncovered \$243,000 worth of fine jewelry and artwork located in various places in the home; the jewelry and artwork were found in laundry bags and suitcases tucked away in the bottom of Bursztyn's bedroom closet.¹⁶² The appraiser's report encompassed eighteen pages; in all, the search uncovered 189 pieces of fine jewelry and 10 works of art.¹⁶³ Understandably, Bursztyn thereafter filed an opposition to the bankruptcy trustee's actions, but the court concluded that the bankruptcy trustee's search of her residence was reasonable under the circumstances, and thus, constitutional.¹⁶⁴

Although the analysis in *In re Bursztyn* largely reflected the conclusions reached by the *In re Barman* court, the *In re Bursztyn* decision is important in two very significant ways. First, the bankruptcy court explicitly adopted the balancing test created by the U.S. Supreme Court in dealing with civil administrative searches.¹⁶⁵ In determining whether a warrantless civil administrative search comports with the reasonableness requirement of the Fourth Amendment, courts are instructed to balance the nature of the intrusion

155. *Id.* at 356-57. The second of these state court matrimonial decisions was issued only three months before Bursztyn filed her bankruptcy petition. *Id.*

156. *Id.* at 357.

157. *Id.* at 357-58.

158. *Id.* at 358.

159. *Id.* Indeed, both state courts believed that Bursztyn was intentionally lying regarding the whereabouts of the jewelry and artwork. *Id.*

160. *In re Bursztyn*, 366 B.R. at 360.

161. *Id.* at 360-61.

162. *Id.* at 361-62.

163. *Id.* at 362.

164. *Id.* at 373-74.

165. *Id.* at 369-70.

upon the privacy interests of the individuals subject to the search against the need for the government to conduct the search.¹⁶⁶ Second, the bankruptcy court observed that incursions on the protections granted by the Fourth Amendment can be authorized to address special circumstances, implicitly concluding that bankruptcy is, in fact, one such special circumstance.¹⁶⁷

Both the *In re Barman* and *In re Bursztyn* decisions aptly noted that “a bankruptcy trustee may need to inspect a debtor’s residence for potentially undisclosed assets” of the estate that can be administered for the benefit of creditors.¹⁶⁸ Indeed, as both decisions recognize, “a trustee may have no alternative in carrying out his or her statutory obligations to marshal and account for all of the property of the estate without an inspection of the debtor’s residence.”¹⁶⁹ Thus, the necessity for such a remedy has already been acknowledged; the remaining inquiry concerns what standard should govern such conduct. As Part IV of this Article argues, bankruptcy trustees have the ability to conduct warrantless searches of debtors’ homes while still complying with the Fourth Amendment under any one of three alternate theories: (1) bankruptcy law as a “special needs” exception; (2) the bankruptcy system as a “closely regulated industry”; and (3) implied consent.

While *In re Barman* and *In re Bursztyn* demonstrate that a bankruptcy trustee can obtain a warrant to search a debtor’s home, several factors weigh in favor of a warrantless search standard in the bankruptcy context. First, the bankruptcy courts are not in concert on the issue of whether a bankruptcy trustee possesses the requisite authority to obtain a search warrant.¹⁷⁰ Second, if the concealment of assets and debtor fraud is, in fact, a systemic problem plaguing the bankruptcy law system, then an unannounced warrantless search is needed in cases where personal assets are easily moved or hidden. Third, if there is cause to believe that a particular debtor is hiding assets, then any advance notice to the debtor of a trustee’s efforts to secure a warrant would possibly defeat the purpose of the search. In other words, the assets would simply “disappear.” Fourth, and similarly, the delay inherent in obtaining a warrant would not promote the need for a bankruptcy trustee to act swiftly before any dissipation of assets. For example, in *In re Bursztyn*, almost a week elapsed between the initial application for a search order by the trustee and its issuance by the bankruptcy court. Such delays would frustrate the trustee’s

166. See, e.g., *Int’l Union v. Winters*, 385 F.3d 1003, 1007 (6th Cir. 2004).

167. *In re Bursztyn*, 366 B.R. at 369 (specifying that “the circumstances of this case present such a special circumstance”).

168. *Id.* at 372 (citing *Taunt v. Barman (In re Barman)*, 252 B.R. 403, 416 (Bankr. E.D. Mich. 2000)).

169. *Id.* (citing *In re Barman*, 252 B.R. at 416-17).

170. Compare *In re Application of Tr. in Bankr. for a Search Warrant*, 173 B.R. 341, 342 (N.D. Ohio 1994) (holding that because a bankruptcy trustee is neither a federal law enforcement office nor an attorney for the government, a trustee “has no authority to apply for issuance of a search warrant”), with *In re Barman*, 252 B.R. at 417 (holding that the issuance of a bankruptcy search and inspection order is “an ordinary part of the judicial and administrative processes of bankruptcy”).

ability to investigate fully the debtor's financial affairs. Fifth, and finally, the capacity of a trustee to conduct a warrantless search of a debtor's home would deter any fraudulent conduct by future debtors who voluntarily seek bankruptcy relief but would otherwise intentionally fail to comply with their mandated statutory duties under the Bankruptcy Code.

IV. The Capacity of a Bankruptcy Trustee To Conduct a Warrantless Search of a Debtor's Home

The Fourth Amendment protects people from unreasonable searches and seizures.¹⁷¹ Despite the seeming simplicity of this general tenet, the Supreme Court's Fourth Amendment jurisprudence on this issue has been described in the scholarly literature as "an embarrassment,"¹⁷² a "doctrinal incoherence,"¹⁷³ "the Supreme Court's tarbaby,"¹⁷⁴ and an utter "mess."¹⁷⁵

But despite the differences of opinion regarding modern Fourth Amendment doctrine, several observations can be made with relative assurance. First, the indiscriminate and unjustified searches and seizures carried out by British officials under the authority of the writs of assistance "were the immediate evils that motivated the framing and adoption of the Fourth Amendment."¹⁷⁶ Second, particularly because the execution of the writs of assistance enabled British officials to search an individual's home without restraint, the concern for privacy in the home has been described as "the root of

171. U.S. CONST. amend. IV.

172. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1993).

173. Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. CIV. RTS. L.J. 261, 261 (2004).

174. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1984).

175. David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005).

176. *Payton v. New York*, 445 U.S. 573, 583 (1980); see also *Stone v. Powell*, 428 U.S. 465, 482 (1976) ("The Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the colonies . . ."); *Boyd v. United States*, 116 U.S. 616, 641 (1886) (Miller, J., concurring) ("While the Framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power."). For a detailed historical account of the writs of assistance and the resistance thereto by the American colonists, see Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996); Akhil Reed Amar, *supra* note 172, at 757; Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 (2004); Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying To Avoid?*, 5 REGENT U. L. REV. 215 (1995); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002) [hereinafter Maclin, *Let Sleeping Dogs Lie*]; Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); and David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004).

the Fourth Amendment itself.”¹⁷⁷ Indeed, the Supreme Court has consistently recognized a special privacy protection for intrusions into the home.¹⁷⁸ The Court, in *Payton v. New York*, expressed this sentiment in unmistakable terms: “The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.”¹⁷⁹ Third, the overriding function of the Fourth Amendment “is to protect personal privacy and dignity against unwarranted intrusion by the State.”¹⁸⁰ To that end, in order to claim the protection of the Fourth Amendment against unwarranted intrusions, an individual must satisfy the two-part test enunciated by Justice Harlan in *Katz v. United States*¹⁸¹: (1) the individual must exhibit an actual subjective expectation of privacy; and (2) this expectation of privacy must be one that society is prepared to recognize as reasonable.¹⁸² Fourth, a condition precedent for constitutional scrutiny is the occurrence of a government-initiated “search” or “seizure.” Under the Fourth Amendment, a “search” occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed.”¹⁸³ Further, a “seizure” of property occurs for Fourth Amendment purposes “when there is some meaningful interference with an individual’s possessory interests in that property.”¹⁸⁴ Fifth, the Fourth Amendment applies in both the criminal and civil contexts.¹⁸⁵

177. Craig M. Bradley, “*Knock and Talk*” and the Fourth Amendment, 84 IND. L.J. 1099, 1101 (2009). As Maclin explains:

Protecting the security of private homes was certainly a priority for the Framers. Indeed, one could say that the Framers were particularly sensitive about safeguarding private homes from governmental intrusion, as the constitutional privilege against unreasonable search and seizure “arose from the harsh experience of householders having their doors hammered open by magistrates and writ-bearing agents of the crown. Indeed, the Fourth Amendment is explainable only by the history and memory of such abuse.” The intrusions that the colonists experienced at the hands of British customs officers “had done violence to the ancient maxim that “A man’s house is his castle.””

Maclin, *Let Sleeping Dogs Lie*, *supra* note 176, at 933 (citations omitted).

178. *Griffin v. Wisconsin*, 483 U.S. 868, 884 (1987) (Blackmun, J., dissenting).

179. *Payton*, 445 U.S. at 589; *see* *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *Silverman*, 365 U.S. at 571 (1961) (“The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

180. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

181. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

182. *Id.*

183. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Because defining government entry into the home as a search is so conventional, this Article presumes that such conduct by a bankruptcy trustee would constitute a search under the Fourth Amendment. *See* Marisa Antos-Fallon, *The Fourth Amendment and Immigration Enforcement in the Home: Can ICE Target the Utmost Sphere of Privacy?*, 35 FORDHAM URB. L.J. 999, 1016 (2008) (“Indeed, defining government entry into the home as a search is so commonplace that it is not frequently discussed in judicial opinions.”).

184. *Jacobsen*, 466 U.S. at 113.

185. *Soldal v. Cook Cnty.*, 506 U.S. 56, 67 (1992).

This is where the consensus regarding the Fourth Amendment ends. The Amendment itself is regarded as containing two distinct clauses: one addressing unreasonable searches and seizures, and the other requiring the issuance of a warrant upon probable cause.¹⁸⁶ Over the past century, scholars and judges debated the relationship between these two clauses.¹⁸⁷ “The relationship between these two clauses is murky at best and has been the topic of much controversy in the two-hundred-plus years since their drafting.”¹⁸⁸

Despite this controversy, the Court has in fact been steadfast in its application of the Fourth Amendment to the home. Indeed, the Court has repeated the principle that, “[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”¹⁸⁹ Because a bankruptcy case is a civil proceeding, many of the exceptions to the warrant requirement, such as exigent circumstances or a search incident to a lawful arrest, obviously do not apply. That said, there are at least three distinct theories by which a bankruptcy trustee need not comply with the warrant requirement prior to conducting a search of a debtor’s home: (1) the

186. Sam Kamin, *The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83, 88 (2004). The text of the Fourth Amendment provides as follows regarding the unreasonable search clause: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” U.S. CONST. amend. IV. Further, the Warrants Clause of the Fourth Amendment provides as follows: “[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

187. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 202 (1993).

188. Kamin, *supra* note 186, at 88. Tracey Maclin describes the essence of the controversy in the following terms:

One side of the debate argues that the clauses of the amendment are independent declarations. The first clause, the Reasonableness Clause, merely guarantees a freedom from unreasonable searches and seizures. The second clause, the Warrant Clause, merely specifies the form and content of search and arrest warrants. Accordingly, the proponents of a rational basis model contend that the Fourth Amendment does not always require that police intrusions be authorized by a judicial warrant The other side of the debate favors the “warrant preference” rule. Initially led by Justice Frankfurter, this side contends that the Warrant Clause modifies the first clause—a reasonable search depends upon the authorization of a valid warrant. While not an absolutist view, this position held that a warrant was a necessary precondition of a reasonable search, unless there was a compelling reason for proceeding without one.

Maclin, *supra* note 187, at 202-04; *see also* Clancy, *supra* note 176, at 993 (“The warrant preference model construes the Reasonableness Clause as being defined by the Warrant Clause; that is, a search is not ‘unreasonable,’ and therefore not forbidden, when it is carried out under the safeguards specified by the Warrant Clause.”).

189. *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *see also* *Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981) (“[A]bsent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant.”); *Payton v. New York*, 445 U.S. 573, 587 (1980) (“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971))).

“special needs” administrative search exception; (2) the “closely regulated industry” search exception; and (3) implied consent.

A. *Bankruptcy as a “Special Needs” Administrative Search Exception to the Warrant Requirement*

Beginning in the middle of the twentieth century, the U.S. Supreme Court was called upon to determine the applicability of the Fourth Amendment in the civil context. The Court first considered¹⁹⁰ the application of the Fourth Amendment to civil searches in *Frank v. Maryland*.¹⁹¹ In the decision, the Court addressed the issue of whether a homeowner’s conviction pursuant to a Baltimore City Code for resisting a warrantless inspection of her home to uncover possible rodent infestation violated the Fourth and Fourteenth Amendments.¹⁹² The Court upheld the warrantless search, emphasizing in its holding that the Fourth Amendment protects against governmental intrusion where the purpose is for eventual criminal prosecution.¹⁹³ In light of the long history of health ordinances and of the modern needs to conduct inspections, the Court held that the Fourth Amendment did not apply to an administrative search.¹⁹⁴

The holding in *Frank*, however, was short-lived. In the companion cases *Camara v. Municipal Court*¹⁹⁵ and *See v. City of Seattle*,¹⁹⁶ the Court articulated a preference for obtaining a warrant as a condition precedent to searching both residential dwellings and commercial premises, respectively. Since the issuance of the *Camara* and *See* decisions in 1967, the administrative search cases under the Fourth Amendment have applied to a variety of different contexts, including, but not limited to: commercial property;¹⁹⁷ inspections for housing code violations;¹⁹⁸ so-called “closely regulated industries”;¹⁹⁹

190. Robert M. Keenan, *Shoemaker v. Handel and Urinalysis Drug Testing: Looking for an American Standard*, 21 GA. L. REV. 467, 472 (1986).

191. *Frank v. Maryland*, 359 U.S. 360 (1959), *overruled by* *Camara v. Mun. Ct.*, 387 U.S. 523 (1967).

192. *Frank*, 359 U.S. at 361-62.

193. *Id.* at 365 (“Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.” (citing *Boyd v. United States*, 116 U.S. 616 (1886))).

194. *Id.* at 373.

195. *Camara*, 387 U.S. at 523.

196. *See v. City of Seattle*, 387 U.S. 541 (1967).

197. *See* *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978) (electrical and plumbing installation business); *See*, 387 U.S. at 541 (commercial warehouse); *McLaughlin v. A.B. Chance Co.*, 842 F.2d 724 (4th Cir. 1988) (operating plant); *United States v. Hajduk*, 396 F. Supp. 2d 1216 (D. Colo. 2005) (chrome plating manufacturer).

198. *See Camara*, 387 U.S. at 523 (violation of San Francisco housing code); *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001) (violation of the City of Dallas housing code).

inspections under the New York's Aid to Families with Dependent Children program;²⁰⁰ investigations for possible arson;²⁰¹ searches of children in public schools;²⁰² searches of state and federal governmental employees;²⁰³ searches of probationers and parolees;²⁰⁴ drug and alcohol testing of railroad employees;²⁰⁵ and hospital patients.²⁰⁶ Although the permutations of the possible types of administrative searches are myriad, what is absent is any application of the administrative search doctrine, and in particular its "special needs" strain, to the bankruptcy law context.

The earliest Supreme Court administrative search cases undeniably expressed a preference for complying with the Warrant Clause, thereby requiring a warrant prior to undertaking an administrative search.²⁰⁷ Shortly thereafter, however, "the Court developed the administrative search doctrine, in which it assessed the constitutionality of civil searches of commercial premises solely under the Reasonableness Clause."²⁰⁸ In its modern iteration, the Court has "resolved the debate concerning the relationship between the Fourth Amendment's two clauses in favor of limiting the Warrant Clause's application to criminal searches, while resolving the constitutionality of all civil searches solely under the Reasonableness Clause."²⁰⁹ From a jurisprudential perspective, within the framework of its administrative search doctrine, the Supreme Court fashioned its "special needs" principle "as civil search litigation less often

199. See *New York v. Burger*, 482 U.S. 691 (1987) (automobile junkyard); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining facility); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealer); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor licensee); *United States v. Parker*, 587 F.3d 871 (8th Cir. 2009) (commercial trucking weigh station); *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181 (5th Cir. 2009) (nightclub); *United States v. Maldonado*, 356 F.3d 130 (1st Cir. 2004) (commercial trucking); *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002) (harness racing facility); *5 Borough Pawn, L.L.C. v. City of New York*, 640 F. Supp. 2d 268 (S.D.N.Y. 2009) (pawnshop).

200. *Wyman v. James*, 400 U.S. 309 (1971).

201. *Michigan v. Tyler*, 436 U.S. 499 (1978).

202. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995).

203. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Int'l Union v. Winters*, 385 F.3d 1003 (6th Cir. 2004); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

204. See *Samson v. California*, 547 U.S. 843 (2006); *United States v. Knights*, 534 U.S. 112 (2001); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *United States v. Graham*, 553 F.3d 6 (1st Cir. 2009); *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. 2005); *United States v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004); *United States v. Reyes*, 283 F.3d 446 (2d Cir. 2002); *United States v. Grimes*, 225 F.3d 254 (2d Cir. 2000); *United States v. Kone*, 591 F. Supp. 2d 593 (S.D.N.Y. 2008); *State v. Turner*, 297 S.W.3d 155 (Tenn. 2009).

205. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1988).

206. *Ferguson v. City of Charleston*, 532 U.S. 67 (2000).

207. Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1227 (2004) ("Initially, the Supreme Court indicated that, as with criminal searches, it would judge the constitutionality of civil searches of commercial and residential premises under the Warrant Clause.").

208. *Id.*

209. *Id.*

involved commercial premises and increasingly involved challenges to more personalized searches.”²¹⁰

Unlike its criminal law counterpart, the Supreme Court’s administrative search jurisprudence in civil cases has proven relatively stable over the past several decades.²¹¹ Starting with the *Camara* decision, the Court has clearly differentiated between searches undertaken in the criminal context from the civil context. Most notably, the *Camara* Court recognized that “probable cause”²¹² as a preliminary showing prior to the issuance of a warrant would simply prove unworkable in the administrative setting.²¹³ Consequently, in concluding that reasonableness is the ultimate standard regarding the constitutionality of a civil search, the Court in *Camara* first articulated what is now the generally accepted test for reasonableness in the civil context: a balancing of the need to search against the invasion which the search entails.²¹⁴

Commencing with *New Jersey v. T.L.O.*,²¹⁵ the Supreme Court has asserted under its Fourth Amendment jurisprudence that “departures from the warrant and individualized suspicion models are justified where the intrusion serves a ‘special need’ that is ‘divorced from the State’s general interest in law enforcement.’”²¹⁶ The nomenclature “special need” was first articulated by Justice Blackmun in his concurring opinion in *T.L.O.* He explained: “Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”²¹⁷ But as Thomas K. Clancy has observed, the term “special need” is misleading. According to Clancy, the Supreme Court does not refer to “any ‘need’ in the sense of necessity; rather, it speaks of a special *interest*,”²¹⁸ meaning interests of a governmental purpose other than criminal law enforcement.²¹⁹

210. *Id.* at 1228.

211. *But see* Hemphill, *supra* note 176, at 247 (arguing that the “[t]he administrative search doctrine has proven to be a major battleground in the war between the clauses”).

212. *See* Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1498-99 (2009) (“In the law enforcement context, the Fourth Amendment’s probable-cause requirement generally sets the balance between the public interest in the potential discovery of crime, evidence, or a suspect against the privacy interests that would be sacrificed by the intrusion.”).

213. *Camara v. Mun. Ct.*, 387 U.S. 523, 538 (1967) (“Where considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.”).

214. *Id.* at 537.

215. 469 U.S. 325 (1985).

216. CLANCY, *supra* note 77, § 11.3.4.4.2.2.

217. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

218. CLANCY, *supra* note 77, § 11.3.4.4.2.2.

219. *Chandler v. Miller*, 520 U.S. 305, 325 (1997) (Rehnquist, C.J., dissenting).

Although Justice Blackmun qualified the special needs cases as the exceptional circumstances, the application of the doctrine has proliferated in the twenty-five years following the *T.L.O.* decision.²²⁰ During this time, the special needs exception to the warrant requirement has been adopted in a variety of contexts, including, but not limited to, the following: (1) a search of a public school student;²²¹ (2) a public employer's search of a public employee's office;²²² (3) a search of a probationer or parolee's home;²²³ and (4) drug testing of railroad employees, state civil service employees, U.S. Customs Service employees, and high school students engaged in extracurricular activities.²²⁴

Following *T.L.O.*, in the companion cases of *National Treasury Employees Union v. Von Raab*²²⁵ and *Skinner v. Railway Labor Executives' Association*,²²⁶ the Supreme Court continued the development of the special needs doctrine by initially reaffirming "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."²²⁷ The reasonableness of a particular search depends ultimately "'on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'"²²⁸ Consequently, to test the constitutionality of a search under the Reasonableness Clause, where a governmental intrusion serves special needs beyond the normal need for crime detection, a court will balance the individual's privacy expectations against the government's interests in conducting the search or seizure.²²⁹

220. For a critique of this expansion of the special needs doctrine, see Jennifer Y. Buffaloe, "Special Needs" and the Fourth Amendment: An Exception Poised To Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 529 (1997); and Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1983).

221. *T.L.O.*, 469 U.S. at 325.

222. *O'Connor v. Ortega*, 480 U.S. 709 (1987); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

223. See *Samson v. California*, 547 U.S. 843 (2006); *United States v. Knights*, 534 U.S. 112 (2001); *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

224. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (high school students engaged in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (same); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (U.S. Customs Service employees); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (railroad employees); *Int'l Union v. Winters*, 385 F.3d 1003 (6th Cir. 2004) (state civil service employees). But see *Chandler v. Miller*, 520 U.S. 305 (1997) (declining to extend the special needs exception to the mandatory drug testing of applicants for high state office in Georgia due to the failure of the state to demonstrate a drug problem among the state's elected officials, who do not perform "high-risk, safety-sensitive tasks").

225. *Von Raab*, 489 U.S. at 656.

226. *Skinner*, 489 U.S. at 602.

227. *Von Raab*, 489 U.S. at 665 (quoting *Skinner*, 489 U.S. at 618).

228. *Skinner*, 489 U.S. at 619 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

229. *Von Raab*, 489 U.S. at 665; see also *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999) ("[W]e must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.").

The context in which the Court has chosen to use the special needs exception to the warrant requirement bears a direct connection in its applicability to the bankruptcy law system.²³⁰ A survey of the special needs cases evidences its use when (1) an individual is compelled to take some action, such as public school students who are required to attend schools;²³¹ (2) there is a need for safety to protect the general public from hazardous conditions;²³² or (3) the individual voluntarily accepts some status, condition, or benefit from the government.²³³ It is this third special needs application, the voluntary nature of some status, condition, or benefit, which has the closest correlation to the bankruptcy law process. More precisely, it is the special needs cases involving probationers or parolees²³⁴ that exhibit the most analogous circumstances to consumer debtors in the bankruptcy law system.

The first Supreme Court decision to apply the special needs doctrine to probationers or parolees was *Griffin v. Wisconsin*.²³⁵ In *Griffin*, Joseph Griffin, who was on probation after conviction for a felony, had his home searched by probation officers acting without a warrant.²³⁶ After the officers conducted the warrantless search of his home and discovered a handgun, a violation of the terms of his probation, Griffin attempted to suppress the evidence seized during the search.²³⁷ In upholding the warrantless search, the Court held that a state's operation of a probation system is a special need beyond normal law enforcement, and probationers, even in their homes, "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on [the] observance of special [probation] restrictions.'"²³⁸ In other words, the special need of supervising probationers permitted "a

230. Dimino, *supra* note 212, at 1522 ("Thus in special-needs cases it is typically the *context* of the search, and not its object, that earns it the appellation."); see also *Chandler v. Miller*, 520 U.S. 305, 314 (1997) ("When . . . 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.").

231. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Wallace by Wallace v. Batavia Sch. Dist.* 101, 68 F.3d 1010 (7th Cir. 1995).

232. See, e.g., *Von Raab*, 489 U.S. at 656; *Skinner*, 489 U.S. at 602.

233. See sources cited *supra* noted 204.

234. Although used interchangeably herein, differences exist between parole and probation. Parole "is the conditional release of a convict before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole." *Beavers v. State*, 666 So. 2d 868, 870 (Ala. Crim. App. 1995) (quoting 67A C.J.S. *Pardon and Parole* § 39 (1978)). By contrast, probation "ordinarily refers to judicial action taken prior" to the prison door being closed on the defendant. *Patuxent Inst. Bd. of Review v. Hancock*, 620 A.2d 917, 926 (Md. 1993) (quoting *State v. Hewett*, 154 S.E.2d 476, 479 (N.C. 1967)).

235. 483 U.S. 868 (1987).

236. *Id.* at 870. Under Wisconsin statutory law, probationers are subject to conditions set by the court and regulations established by the Wisconsin Department of Health and Social Services. *Id.* One of the Department's regulations permits any probation officer to search a probationer's home without a warrant as long as there are "reasonable grounds" to believe the probationer is in possession of any contraband or weapons and his supervisor approves. *Id.* at 870-71.

237. *Id.* at 871-72.

238. *Id.* at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

degree of impingement upon privacy that would not be constitutional if applied to the public at large.”²³⁹

Additionally, other factors militating in favor of foregoing the warrant requirement include the delay in obtaining the warrant, thereby making it more difficult for probation officers “to respond quickly to evidence of misconduct,” and the associated reduction in the “deterrent effect that the possibility of expeditious searches would otherwise create.”²⁴⁰ In its next case involving probationers, *United States v. Knights*,²⁴¹ the Court supplemented this special needs doctrine. In upholding the warrantless search of a probationer’s apartment, the Court balanced the competing interests in favor of the government, concluding that a “reasonable suspicion” on behalf of the government is all that is needed to justify the search.²⁴²

In its last special needs case regarding probationers or parolees, *Samson v. California*,²⁴³ the Court addressed an issue left unresolved by *Knights*: “[W]hether a condition of release can so diminish or eliminate a released prisoner’s reasonable expectation of privacy that a suspicionless search” would pass Fourth Amendment scrutiny.²⁴⁴ Based predominantly upon the California Penal Code and the state’s parolee supervisory system, the Court held that the Fourth Amendment permits a suspicionless search of a parolee.²⁴⁵ For purposes of analogizing the probation or parole special needs doctrine to the status of consumer debtors, *Samson* is distinguishable from *Knights* and *Griffin* in two very important respects.

First, the search in *Samson* did not occur in the parolee’s home, but rather on a public street.²⁴⁶ Second, and as Justice Stevens’ dissent makes plain, “neither *Knights* nor *Griffin* supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer.”²⁴⁷ Importantly, and particularly because a bankruptcy trustee’s intrusion on privacy would occur in the home, the special needs exception for bankruptcy law advocated herein would require an element of individualized suspicion of the debtor prior to any

239. *Id.* at 875.

240. *Id.* at 876.

241. 534 U.S. 112 (2001).

242. *Id.* at 121 (“When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal conduct, there is enough likelihood that criminal activity is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable.”).

243. *Samson v. California*, 547 U.S. 843 (2006).

244. *Id.* at 847. A suspicionless search is one undertaken without any “level of individualized suspicion of wrongdoing.” 68 AM. JUR. 2D *Searches and Seizures* § 4 (2010).

245. *Samson*, 547 U.S. at 856.

246. *Id.* at 846.

247. *Id.* at 857 (Stevens, J., dissenting).

search. Nonetheless, *Samson* is useful to the analogy between probationers or parolees and consumer debtors.

Although analogizing consumer debtors to parolees and probationers may appear at first blush distasteful to many, the purpose of the exercise is not to impugn the character of consumer debtors as a group, but rather to demonstrate a similarity of circumstances. This comparison is helpful in leading to the conclusion that the creation of a new special needs exception to the Fourth Amendment for bankruptcy law is not shocking, but rational.

First, while the Constitution grants Congress the authority to enact a uniform, national bankruptcy law,²⁴⁸ an individual does not have a constitutional right to file for bankruptcy protection.²⁴⁹ More particularly, federal courts have routinely noted that a discharge in bankruptcy is not a right, but a privilege bestowed upon deserving debtors pursuant to federal statutory law.²⁵⁰ This privilege is exercised by the bankruptcy court “only so long as the judicial process which provides it is not abused.”²⁵¹ Moreover, and quite significantly, in the overwhelming majority of cases,²⁵² a consumer debtor voluntarily seeks relief under the Bankruptcy Code.²⁵³ Similarly, “by accepting the privilege of parole a prisoner consents to the broad supervisory and visitatorial powers which his parole officer must exercise over his person and property until the term of his sentence shall have expired or been terminated.”²⁵⁴ Indeed, courts have concluded that like the filing of a

248. U.S. CONST. art. I, § 8, cl. 4 (“To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”).

249. See *United States v. Kras*, 409 U.S. 434, 446 (1973) (“There is no constitutional right to obtain a discharge of one’s debts in bankruptcy.”); *Scarfia v. Holiday Bank*, 129 B.R. 671, 675 (M.D. Fla. 1990) (noting that “a discharge in bankruptcy is neither an inherent nor a constitutional right.”); *In re Elisade*, 172 B.R. 996, 1001 (Bankr. M.D. Fla. 1994) (“A debtor does not have a constitutional right to receive a discharge of his bankruptcy.”); see also Craig Peyton Gaumer & Paul R. Griffith, *Presumed Indigent: The Effect of Bankruptcy on a Debtor’s Sixth Amendment Right to Criminal Defense Counsel*, 62 UMKC L. REV. 277, 301 n.128 (1993) (“While the federal bankruptcy system is a federal creation, a person does not have a constitutional right to file bankruptcy.” (citing *Kras*, 409 U.S. at 446)); Thomas G. Kelch & Michael K. Slattery, *The Mythology of Waivers of Bankruptcy Privileges*, 31 IND. L. REV. 897, 900 (1998) (“Not only is there no constitutional right to file bankruptcy, but Congress need not even create a bankruptcy law.”).

250. See, e.g., *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996) (“It is also important, however, to recognize that a discharge in bankruptcy is a privilege, not a right, and should only inure to the benefit of the honest debtor.”); *In re McVay*, 345 B.R. 846, 851 (Bankr. N.D. Ohio 2006) (“A bankruptcy discharge is a privilege, intended to provide not only a debtor with a fresh start but to afford a debtor’s creditors an equitable distribution of the debtor’s assets, twin goals which can only be fulfilled if a debtor is completely honest.”); *In re Lewandowski*, 325 B.R. 700, 707 (Bankr. M.D. Pa. 2005) (“This by no means evidences a statutory guarantee that a debtor is automatically entitled to a discharge once the bankruptcy process is commenced. A bankruptcy discharge is a privilege, not a constitutional right.”).

251. *Sicherman v. Lah (In re Lah)*, 88 B.R. 141, 145 (Bankr. N.D. Ohio 1988).

252. WILLIAM H. BROWN, *BANKRUPTCY AND DOMESTIC RELATIONS MANUAL* § 2:6 (2010) (“The vast majority of bankruptcy cases are filed voluntarily by debtors, as opposed to those filed involuntarily against them.”); TABB, *supra* note 46, § 1.23 (“A Chapter 7 case is commenced by the filing of a petition. The petition in almost all cases is filed by the debtor; those cases are called ‘voluntary.’”).

253. *In re Wincek*, 202 B.R. 161, 168 (Bankr. M.D. Fla. 1996).

254. *People v. Denne*, 297 P.2d 451, 458 (Cal. Ct. App. 1956).

bankruptcy petition, “[r]elease on parole is a privilege and not a right.”²⁵⁵ Further, like the filing of a bankruptcy petition to obtain the discharge of debt, the acceptance of probation or parole is a voluntary act accepted for a corresponding benefit, that is, release from custody.²⁵⁶ Consequently, both the consumer debtor and the probationer voluntarily accept a benefit bestowed by the government or the court—the discharge of one’s debts and the release from incarceration—in exchange for agreeing to be bound by certain conditions.

Second, with regard to the acceptance of conditions, consumer debtors, in order to receive the benefit of a discharge of their pre-petition indebtedness, must fully cooperate in the bankruptcy process by, among other things, completely disclosing the extent of their assets.²⁵⁷ To be sure, “[c]andor, accuracy and integrity are required of a debtor in bankruptcy.”²⁵⁸ And while the conditions imposed upon probationers and parolees can be varied and do not necessarily hinge upon candor and integrity, the parole and probation systems depend upon a parolee’s or probationer’s adherence to the conditions imposed by a court, statute, or regulation.²⁵⁹ More specifically, like the denial or revocation of the benefit of the discharge for violating some behavior norm provided by the Code,²⁶⁰ the benefit of parole or probation may be revoked for noncompliance.²⁶¹

Third, as a result of filing for bankruptcy protection, consumer debtors have a “significantly” reduced expectation of privacy in their houses, papers and effects “that society is prepared to recognize as reasonable.”²⁶² As the court

255. *State v. Turner*, 297 S.W.3d 155, 162 (Tenn. 2009); *see also* Patuxent Inst. Bd. of Review v. Hancock, 620 A.2d 917, 926 (Md. 1993) (“Since parole is a matter of grace and not of right, the state may condition continuance of parole on the parolee’s compliance with certain prescribed conditions.”).

256. *Simon v. United States*, 269 F. Supp. 738, 745 (E.D. La. 1967) (“Probation and parole are a matter of legislative grace. No accused is entitled to either of right.” (quoting *Lathem v. United States*, 259 F.2d 393, 397 (5th Cir. 1958))); *People v. Brown*, 236 Cal. Rptr. 506, 508-09 (Ct. App. 1987) (“Contrary to the situation in *Burgener*, this defendant entered into a *voluntary* agreement whereby he waived his right to privacy in exchange for the privilege of being released on probation. Unlike *Burgener*, this defendant had every right to refuse to accept the terms and conditions of probation proffered by the court.”); *In re Gonzales*, 118 Cal. Rptr. 69, 71 (Ct. App. 1974) (“Although petitioner accepted probation on terms fixed by the . . . court, he may challenge an invalid condition of probation in this habeas corpus proceeding.”).

257. *Roudebush v. Sharp (In re Sharp)*, 244 B.R. 889, 891 (Bankr. E.D. Mich. 2000).

258. *Holder v. Bennett (In re Bennett)*, 126 B.R. 869, 875 (Bankr. N.D. Tex. 1991).

259. Melissa Weiss, *Interpreting Searches of Pretrial Releasees Through the Lens of the Fourth Amendment Special Needs Exception*, 35 HOFSTRA L. REV. 363, 400 (2006) (“Releasee compliance is essential to furthering the aims of the bail system.”); *cf. Rizzo v. Terenzi*, 619 F. Supp. 1186, 1189 (E.D.N.Y. 1985) (“The viability of the parole system depends upon certain restrictions, among them the ability to monitor and control travel.”).

260. *See generally* 11 U.S.C. § 727 (2006) (enumerating the circumstances warranting a denial of a Chapter 7 discharge).

261. *Patuxent Inst. Bd. of Review v. Hancock*, 620 A.2d 917, 926-27 (Md. 1993).

262. *Taunt v. Barman (In re Barman)*, 252 B.R. 403, 414 (Bankr. E.D. Mich. 2000); *see also* *United States v. Andujar*, No. 05-1801, 2006 WL 3741843, at *3 (3d Cir. Dec. 12, 2006) (holding that a debtor in bankruptcy has a reduced expectation of privacy in his or her documents); *Wade v. Smith*, No. IP 88-65-C, 1991 WL 504873, at *6 (S.D. Ind. May 30, 1991) (“[A] bankrupt cannot reasonably expect to be free from intrusions by the trustee, who is entitled to possession of the bankrupt’s property.”);

in *In re Barman* noted, this significantly reduced expectation of privacy “is a natural consequence of the substantial and detailed disclosures that are inherent in the bankruptcy process.”²⁶³ Likewise, by agreeing to be bound by certain conditions, it has repeatedly been held that probationers and parolees also have a significantly diminished expectation of privacy in their homes.²⁶⁴

Fourth, insuring the efficiency and integrity of the national bankruptcy law system is of interest to the Department of Justice, the Office of the United States Trustee, the federal courts, and, most importantly, to the economic interests of the entire country.²⁶⁵ This notion is so axiomatic that in 1788 James Madison articulated as follows in Federalist No. 42:

The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties live, or their property may lie, or be removed into different States, that the expediency of it seems not likely to be drawn into question.²⁶⁶

As F. Regis Noel has observed, Madison’s statement on the centrality of the bankruptcy laws to our national economy “shows that relief from debt was considered important and desirable in that early and undeveloped stage of our country’s commerce.”²⁶⁷ Tellingly, Madison’s pronouncement in Federalist No. 42 and Noel’s observation are no less significant today.²⁶⁸ Indeed, in the

Mary Jo Obee & William C. Plouffe, Jr., *Privacy in the Federal Bankruptcy Courts*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1011, 1071 (2000) (noting that “debtors seeking relief under the Bankruptcy Code acquiesce to some invasion of their privacy rights”); Taylor, *supra* note 144, at 609 (“Given the disclosure requirements imposed upon individual debtors by the bankruptcy code, a debtor cannot reasonably expect to retain the same level of privacy inside of bankruptcy as out.”).

263. *In re Barman*, 252 B.R. at 414.

264. *United States v. Knights*, 534 U.S. 112, 120 (2001).

265. See *United States v. Wagner*, 382 F.3d 598, 608 (6th Cir. 2004) (noting that the “efficiency and manageability of the bankruptcy system relies heavily on the free flow of accurate information”); *Wolinsky v. Maynard (In re Maynard)*, 269 B.R. 535, 542 (D. Vt. 2001) (“In addition to the important public interest in upholding the integrity of the bankruptcy system and preventing tainted compromise, there is a public interest in encouraging [the] just, speedy, inexpensive, and final resolution of disputes.”); *Schechter v. Hansen (In re Hansen)*, 325 B.R. 746, 757 (Bankr. N.D. Ill. 2005) (“Indeed, ‘the very integrity of the bankruptcy court and the successful administration of the bankruptcy system rest upon compliance with the debtor’s obligation of disclosure.’” (citing *Urological Grp., Ltd. v. Petersen (In re Petersen)*, 296 B.R. 766, 790 (Bankr. C.D. Ill. 2003))); *Roudebush v. Sharp (In re Sharp)*, 244 B.R. 889, 892 (Bankr. E.D. Mich. 2000) (noting that a trustee’s “ability to perform the duties set forth in 11 U.S.C. § 704 depends on the accuracy and completeness of the debtor’s disclosures”); *Garcia v. Coombs*, 193 B.R. 557, 565 (Bankr. S.D. Cal. 1996) (“The veracity of the bankrupt’s statements is essential to the successful administration of the Bankruptcy Act.”) (citation omitted); see also Mark Bradshaw, *The Role of Politics and Economics in Early American Bankruptcy Law*, 18 WHITTIER L. REV. 739, 755 (1996) (“By creating a uniform bankruptcy law that preempted the then existing numerous state laws, the federalists concentrated power in the national legislature and created important national economic policy.”) (emphasis added).

266. THE FEDERALIST NO. 42 (James Madison).

267. NOEL, *supra* note 3, at 6.

268. *Cont’l Air Lines, Inc. v. Hillblom (In re Cont’l Air Lines, Inc.)*, 61 B.R. 758, 768 (S.D. Tex. 1986) (“Bankruptcy proceedings have long held a special place in the federal system due to their importance to the smooth functioning of the nation’s commercial activities.”).

legislative history to the Bankruptcy Reform Act of 1978, Congress noted the strong national interest in the proper administration of bankruptcy cases.²⁶⁹ As one court has noted:

Our nation's economy depends extensively on the availability of credit to individuals. Hundreds of thousands of bankruptcy petitions are filed each year—most of them by individuals seeking to extinguish or restructure overwhelming debts. Not only do these debtors have a gravely important interest in obtaining a fresh start so that they need not toil the remainder of their years attempting to win an unwinnable battle with crushing debt . . . their creditors have a similarly grave interest in a uniform system of asserting and protecting their rights and in being treated fairly. The flow of consumer credit, the very lifeblood of the national economy, would almost certainly be constricted by the absence of a bankruptcy system comparable to that established by the Bankruptcy Code. Our nation's economic welfare undeniably has come to depend upon ordinary consumers making purchases on credit that are unsecured by collateral. For these reasons, the federal government's interest in maintaining the bankruptcy system is one of the highest order and must, therefore, be regarded as compelling.²⁷⁰

In a similar manner, it is unquestionably accepted that a state's operation of its probation system presents a special need beyond normal law enforcement, due both to the need to ensure community safety while the probationer or parolee is on release and to make certain that the restrictions placed on the individual are observed.²⁷¹ The purpose of the supervisory release system is not to uncover criminal conduct but to maintain compliance. Thus, the effective operation of the supervisory release system itself takes precedence over the privacy interests of any individual probationer or parolee.

As such, there certainly exists a strong governmental and national interest in the proper functioning of the federal bankruptcy law system; a compelling interest on equal ground with the need to ensure the proper operation of a state's parole and probation system.

Despite this last observation, however, A. Mechele Dickerson argues that the government does not have a compelling interest to prevent fraud in consumer bankruptcy cases because “bankruptcy laws are designed to structure the relative rights debtors and creditors have in a debtor's property”²⁷² and do not implicate “the public health or safety issues.”²⁷³ Dickerson characterizes the potential for discovering undisclosed assets that will in turn be used to pay

269. H.R. REP. NO. 95-595, at 88 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6050.

270. *Magic Valley Evangelical Free Church, Inc. v. Fitzgerald* (*In re Hodge*), 220 B.R. 386, 392 (D. Idaho 1998). *But see* *United States v. Kras*, 409 U.S. 434, 446-47 (1973) (holding that debtors have no “fundamental” constitutional right to bankruptcy relief).

271. *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

272. Dickerson, *supra* note 144, at 293 (citing *In re Blue*, 4 B.R. 580, 587 (Bankr. D. Md. 1980)).

273. *Id.* at 292.

creditors as merely a private, commercial dispute between two parties.²⁷⁴ In support of this conclusion, Dickerson analogizes the dynamic of the trustee in the bankruptcy system to a private party engaged in litigation. To this end, Dickerson argues that “if a private party suspects that an adversary is withholding information or documents in private litigation, their recourse is to seek sanctions—not to search their adversary’s home.”²⁷⁵ In other words, because a private party in a nonbankruptcy collection proceeding cannot obtain authorization to search an adversary’s residence upon suspicion of concealed assets, Dickerson argues that this same limitation should be placed upon a trustee in bankruptcy.²⁷⁶

Dickerson’s analogy of a bankruptcy trustee to a private litigant attempting to collect a debt in a simple, two-party commercial dispute is flawed for several reasons. First, unlike private litigants who solely represent their own interests, bankruptcy trustees represent the estate and the body of unsecured creditors.²⁷⁷ Stated slightly differently, unlike a private party, a bankruptcy trustee is a fiduciary for the bankruptcy estate and must act for the collective benefit of all creditors.²⁷⁸ Second, dissimilar to a private litigant, a bankruptcy trustee is specifically charged with the statutory obligations to investigate the financial affairs of the debtor, to secure possession of estate assets,²⁷⁹ and to collect all nonexempt property of the estate to liquidate for the benefit of

274. *Id.* at 294 (“Notwithstanding the *In re Barman* court’s attempt to draw comparisons between the search in this case and those sanctioned by the Supreme Court in other civil contexts, discovering assets that will be included in a debtor’s bankruptcy estate and then used to pay a debt is a private commercial dispute.” (citing *Taunt v. Barman (In re Barman)*, 252 B.R. 403, 415-16 (Bankr. E.D. Mich. 2000))).

275. *Id.*

276. *Id.* at 292-98. In particular, Dickerson argues as follows:

The federal government does not have a compelling interest in what is essentially a dispute between private parties, *i.e.*, the debtor and his creditors. Once a trustee is appointed, the trustee has the right to title and possession of property of the estate, and debtors statutorily are required to assist trustees. Notwithstanding this, existing law does not justify giving trustees the right to search the home of a debtor to find property (or documents related to that property) that the trustee may use to pay creditor claims any more than it would justify giving a private plaintiff the right to search a home to get documents or objects that could be used to support its claim or pay any judgment subsequently rendered in the case.

Id. at 298.

277. *In re Parker*, 186 B.R. 208, 210 (Bankr. E.D. Va. 1995).

278. *Germain v. Conn. Nat’l Bank*, 988 F.2d 1323, 1330 n.8 (2d Cir. 1993) (“The Chapter 7 trustee is an officer of the court and owes a fiduciary duty both to the debtor and to the creditors as a group.”); *see also In re NSCO, Inc.*, 427 B.R. 165, 174 (Bankr. D. Mass. 2010) (“Bankruptcy trustees are fiduciaries and the obligations imposed on them in administering bankruptcy estates are fiduciary obligations.”); *Wolf v. Kupetz (In re Wolf & Vine, Inc.)*, 118 B.R. 761, 771 (Bankr. C.D. Cal. 1990) (“A trustee owes each creditor of the estate a fiduciary duty.”).

279. *In re Rollins*, 175 B.R. 69, 74 (Bankr. E.D. Cal. 1994); *see also In re Chicago Art Glass, Inc.*, 155 B.R. 180, 188 (Bankr. N.D. Ill. 1993) (noting that a “trustee is required to ‘assume possession or exercise control over *all known* assets of the estate’” (quoting *In re Melenzyer*, 140 B.R. 143, 155 (Bankr. W.D. Tex. 1992))).

creditors.²⁸⁰ No such charge is bestowed upon an adverse party in a private, two-party litigation. Third, unlike a private litigant searching for property to levy against for satisfying a judgment, by virtue of § 541 of the Bankruptcy Code, a bankruptcy trustee is a custodian of any property owned by the debtor and succeeds to any interests in such property which the debtor possesses.²⁸¹ Consequently, unlike a private party, a bankruptcy trustee exercises significant control and dominion over a debtor's personal property. Fourth, and perhaps most importantly, the U.S. Trustee's *raison d'être* is to oversee and to protect the integrity of the bankruptcy system.²⁸² More fundamentally, the U.S. Trustee Program, which is effectuated by panel trustees in individual cases, is designed to act as a collective guardian against fraud, dishonesty, and overreaching in the bankruptcy arena.²⁸³ Thus, in analogizing a bankruptcy trustee to a private litigant in a two-party commercial dispute, Dickerson simply fails to account for the national public interest in the efficient and proper operation of the federal bankruptcy system.²⁸⁴ It is precisely the strong national interest in ensuring a debtor's compliance with the mandates of the Bankruptcy Code that justifies a reasonable intrusion into an individual's privacy concerns, particularly when a debtor voluntarily chooses to obtain the benefits of the bankruptcy process. Such an overriding national interest does not exist in a garden-variety two-party private commercial contract dispute.

Federal courts often rely on the individual's status as a probationer or parolee as an aid to determining the ultimate reasonableness of a search when balancing the government's interest in conducting a search against the privacy interests of the individual.²⁸⁵ In other words, by taking the probationer's or parolee's diminished expectations of privacy and voluntary acceptance of the terms of released supervision, and by balancing this against the government's legitimate interest in ensuring the successful operation of the parole and probation systems, the federal courts routinely approve warrantless searches of residences based upon no more than reasonable suspicion. It should likewise be concluded that a bankruptcy trustee is authorized to conduct a warrantless

280. Ernst & Young v. Matsumoto (*In re United Ins. Mgmt., Inc.*), 14 F.3d 1380, 1386 (9th Cir. 1994); see also *In re Duque*, 177 B.R. 397, 403 (Bankr. S.D. Fla. 1994) ("Discovery of, and recovery of, the Debtor's assets are among the Trustee's principal duties as bankruptcy trustee.").

281. Yadkin Valley Bank & Trust Co. v. Nw. Bank (*In re Hutchinson*), 132 B.R. 827, 832 (Bankr. M.D.N.C. 1991).

282. *In re Nieves*, 246 B.R. 866, 870 (Bankr. E.D. Wis. 2000) (citing *In re Dow Corning Corp.*, 195 B.R. 147, 148 (Bankr. E.D. Mich. 1996)).

283. *Id.*; see also Clippard v. Russell (*In re Russell*), 392 B.R. 315, 364 (Bankr. E.D. Tenn. 2008) ("The U.S. Trustee ha[s] the authority and the duty to investigate to determine whether the debtor is abusing the bankruptcy system and whether grounds exist for opposing a discharge of her debts."); McDow v. We the People Forms & Serv. Ctrs., Inc. (*In re Douglas*), 304 B.R. 223, 234 (Bankr. D. Md. 2003) ("The U.S. Trustee is clothed by law with the duty of policing the bankruptcy system to prevent . . . abuse[] . . ." (citing 28 U.S.C. § 536 (2000))).

284. See Taylor, *supra* note 144, at 623 ("The public has a strong interest in the negative impact that a faulty bankruptcy system has on the economy.").

285. *E.g.*, State v. Turner, 297 S.W.3d 155, 161 (Tenn. 2009).

search, inventory, and appraisal of a debtor's home so long as the trustee possesses reasonable suspicion that the debtor is concealing distributable assets from the bankruptcy process.²⁸⁶ This is true because: (1) a consumer debtor has a significantly reduced expectation of privacy; (2) filing for bankruptcy relief is voluntary; and (3) the government has a compelling interest in ensuring the integrity of the national bankruptcy system. Therefore, it should not be at all discomforting for the federal courts to conclude that upholding the bankruptcy law is a new special needs exception to the Fourth Amendment.

It must be noted, however, that there exists one distinguishing feature in the analogy between parolees or probationers and consumer debtors. In the parolee or probationer situation, there usually exists a state statute or regulation that authorizes a search of the individual's home. If none exists, then it is commonplace for the probationer or parolee to sign a probation order agreeing to a search of the home, with or without a warrant.²⁸⁷ At present, the federal courts are split on the issue of whether a probationer or parolee can be subject to a warrantless home search in the absence of a statute or regulation authorizing such intrusion.²⁸⁸ Nevertheless, parolees or probationers know in advance that their residences can be subject to a warrantless intrusion. Indeed, it would be disingenuous to suggest that this fact has not played a role in the Court's decisions in this regard.²⁸⁹

Simply put, there is nothing in the Bankruptcy Code that would alert a debtor in advance of the possibility of a home search.²⁹⁰ This fact does

286. See *New York v. Burger*, 482 U.S. 691, 716 (1987) ("The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect."); see also *United States v. Simons*, 206 F.3d 392, 400 (4th Cir. 2000) ("FBI did not lose its special need for 'the efficient and proper operation of the workplace,' merely because the evidence obtained was evidence of a crime." (citing *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987))).

287. See, e.g., *Samson v. California*, 547 U.S. 843 (2006) (authorizing a warrantless search of a residence with or without cause under the California Penal Code); *United States v. Knights*, 534 U.S. 112 (2001) (consenting to a residence search with or without a warrant); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (permitting a warrantless home search so long as "reasonable grounds" to believe a violation occurred); *United States v. Reyes*, 283 F.3d 446 (2d Cir. 2002) (allowing a warrantless search of a home).

288. Compare *United States v. Yuknavich*, 419 F.3d 1302, 1311 (11th Cir. 2005) (permitting a warrantless search in the absence of any regulation or condition authorizing the search), and *United States v. Keith*, 375 F.3d 346, 350 (5th Cir. 2004) (concluding that a warrantless search by probation and police officers was reasonable despite the lack of probation condition or state regulation authorizing such searches because "the needs of the probation system outweigh the privacy rights of the probationers generally"), with *United States v. Carnes*, 309 F.3d 950, 962-63 (6th Cir. 2002) (holding that a warrantless search by parole and police officers was unreasonable where neither parole agreement nor state regulation authorized searches without warrants), and *United States v. Kone*, 591 F. Supp. 2d 593 (S.D.N.Y. 2008) (finding the warrantless search of a probationer's home unreasonable in the absence of a probation condition or statute authorizing the search).

289. See, e.g., *Knights*, 534 U.S. at 119-20 ("The probation order clearly expressed the search condition and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights' reasonable expectation of privacy.").

290. One way around this dilemma would be for Congress to amend the Bankruptcy Code to authorize trustees to search debtors' homes.

admittedly make the analogy less than perfect, but not ultimately unworkable. More importantly, though, while a consumer debtor arguably does not forfeit all expectations of privacy upon filing for bankruptcy, it also cannot be said that a debtor is unaware of the scrutinizing aspect of the bankruptcy process itself, given the extensive personal and financial information that must be disclosed on the bankruptcy petition and accompanying schedules. Irrespective of the split of authority regarding whether some advance notice is needed prior to conducting the search, the needs of protecting the integrity of the bankruptcy system requiring full disclosure by consumer debtors outweigh the expectations of privacy of the particular debtor who has voluntarily sought the benefits of the bankruptcy process.²⁹¹

Ultimately, if called upon to do so in the future, it would be practical for the federal courts to adopt a new special needs exception to the Fourth Amendment warrant requirement that would enable a search of a debtor's home based upon reasonable suspicion because such an implementation would promote the effectual operation of the bankruptcy laws.

B. The Bankruptcy Law System as a Closely Regulated Industry Under the Fourth Amendment

In addition to the special needs exception to the warrant requirement, the Supreme Court has also upheld warrantless administrative searches for closely regulated industries, such as liquor stores,²⁹² pawnshops,²⁹³ firearms dealers,²⁹⁴ underground mines,²⁹⁵ automobile junkyards,²⁹⁶ racing tracks,²⁹⁷ dental offices,²⁹⁸ and commercial trucking.²⁹⁹ As it currently stands, the warrantless exception for regulated industries would not apply to a bankruptcy trustee's contemplated search of a debtor's residence, primarily because the Bankruptcy Code does not currently provide for an "administrative scheme" that would substitute for a warrant. However, it would be entirely reasonable for the federal courts to extend the ever-expanding list of "industries" falling under the warrantless exception to the Fourth Amendment to include the bankruptcy law

291. *In re Lufkin*, 255 B.R. 204, 211 (Bankr. E.D. Tenn. 2000) (holding that the interests of the trustee and the public outweigh any privacy interests which the debtor may possess).

292. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

293. *Winters v. Bd. of Cnty. Comm'rs*, 4 F.3d 848 (10th Cir. 1993).

294. *United States v. Biswell*, 406 U.S. 311 (1972).

295. *Donovan v. Dewey*, 452 U.S. 594 (1981).

296. *New York v. Burger*, 482 U.S. 691 (1987).

297. *Diercks v. Wis. Dep't of Admin.*, No. 02-C-988, 2006 WL 3761333, at *1 (E.D. Wis. Dec. 20, 2006).

298. *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629 (5th Cir. 2000).

299. *See United States v. Parker*, 587 F.3d 871 (8th Cir. 2009); *United States v. Maldonado*, 356 F.3d 130 (1st Cir. 2004).

system, so long as the Bankruptcy Code is amended to provide for a warrantless search of a debtor's residence.³⁰⁰

Perhaps in accordance with its Fourth Amendment jurisprudence in general, the Supreme Court has not been entirely consistent in its historical application of the administrative search doctrine to closely regulated industries.³⁰¹ The Court in 1967 first expressed a preference for a governmental authority to secure an administrative warrant prior to entering and inspecting commercial premises.³⁰² Yet only three years later, the Court approved a warrantless search of an establishment selling liquor based upon the long history of close supervision of that industry.³⁰³ Then, two years later, the Court approved a warrantless search of a gun dealer's locked storeroom during operating hours primarily because the Federal Gun Control Act specifically contemplated and provided for a warrantless inspection of business premises.³⁰⁴

The modern iteration of the administrative search doctrine for closely regulated industries was expressed by the Court in *Donovan v. Dewey*³⁰⁵ and *New York v. Burger*.³⁰⁶ In *Donovan*, the Court held that warrantless inspections without prior notice to the operators of underground mines were reasonable under the Fourth Amendment because the Federal Mine Safety and Health Act provided a "sufficiently comprehensive and predictable" statutory inspection scheme.³⁰⁷ More particularly, the Court concluded that a warrant is not constitutionally required when Congress "has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined [so] that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."³⁰⁸

300. The possibility of amending the Bankruptcy Code to authorize a trustee to search a debtor's residence has previously been raised by Dickerson. See Dickerson, *supra* note 144, at 28.

301. For a detailed account of the historical development of the closely regulated industry exception to the warrant requirement, see 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.2 (4th ed. 2004).

302. See *v. City of Seattle*, 387 U.S. 541, 544 (1967) ("We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.").

303. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

304. *United States v. Biswell*, 406 U.S. 311, 317 (1972) ("We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.").

305. *Donovan v. Dewey*, 452 U.S. 594 (1981).

306. *New York v. Burger*, 482 U.S. 691 (1987).

307. *Donovan*, 452 U.S. at 600.

308. *Id.* But see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315-321 (1978) (holding that a warrantless search of an electrical installation business pursuant to the Occupational Safety and Health Act of 1979 was unconstitutional because the Act failed to tailor the scope and frequency of the inspections to any particular health and safety concern posed by the numerous businesses regulated by the Act).

Taking its lead from *Donovan*, the Court in *Burger* refined the parameters of a warrantless search of a closely regulated industry. At issue in *Burger* was the constitutionality of a warrantless search of an automobile junkyard, conducted pursuant to a state statute authorizing such a search.³⁰⁹ After first recognizing that owners or operators of a closely regulated industry have reduced expectations of privacy in their premises, the Court concluded that a warrantless search of a closely regulated industry would be considered reasonable under the Fourth Amendment if three factors were satisfied: (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspection must be necessary to further that regulatory scheme; and (3) the administrative scheme at issue must provide a constitutionally adequate substitute for a warrant.³¹⁰ To fulfill the last requirement and serve as a warrant substitute, the regulatory statute must advise the property owner that the search is being conducted pursuant to law, the search itself must have a “properly defined scope,” and the statute must limit the discretion of the officials undertaking the search.³¹¹ To limit the discretion of the searching officials, the statute must limit the time, place, and scope of any contemplated search.³¹² Finally, the administrative scheme must apprise the property owner in advance of the potential for a search of the premises.³¹³

In requiring a bankruptcy trustee to obtain a warrant prior to searching a debtor’s home, both the *In re Barman* and *In re Bursztyn* courts expressed a hesitancy to sanction such conduct precisely because no section of the Bankruptcy Code “states or implies an obligation upon a debtor to permit an inspection by a trustee without a court order.”³¹⁴ Furthermore, both courts observed that while the statutory requirements of disclosure and cooperation placed upon debtors are onerous, these obligations have never been construed to require a debtor to allow a home search absent a court order.³¹⁵ These legitimate concerns, however, can be mollified by amending the Bankruptcy Code to provide for a warrantless search that would satisfy the standards of *Burger*.

Filing for personal bankruptcy is not akin to operating a commercial enterprise, but the underlying notions are essentially the same. The bankruptcy process and a closely regulated commercial industry do share a common characteristic, namely, the regularity and pervasiveness of governmental oversight. Indeed, the moment a debtor files for bankruptcy protection, the

309. *Burger*, 482 U.S. at 693.

310. *Id.* at 702-03.

311. *Id.* at 703.

312. *Id.*

313. *Id.*

314. *Youngman v. Bursztyn (In re Bursztyn)*, 366 B.R. 353, 371 (Bankr. D.N.J. 2007) (quoting *Taunt v. Barman (In re Barman)*, 252 B.R. 403, 414 (Bankr. E.D. Mich. 2000)).

315. *See id.; In re Barman*, 252 B.R. at 414.

federal government, through the Department of Justice and the Office of the U.S. Trustee, regulates and oversees every aspect of the consumer bankruptcy process. Like the operation of a pawnshop, underground mine, automobile junkyard, or dental office, the instant a voluntary bankruptcy petition is filed—an act analogous to a business establishment applying for and obtaining an operator's license—every aspect of the case is supervised by units of the federal government. The pervasiveness of such governmental oversight can be traced back at least three decades to the enactment of the Bankruptcy Code and the creation of the U.S. Trustee Program.

In *Burger*, the requirement of a substantial governmental interest was satisfied because the State of New York demonstrated a need to regulate the vehicle-dismantling industry, “because motor vehicle theft ha[d] increased in the State and because the problem of theft is associated with th[e] industry.”³¹⁶ Moreover, the Court observed that automobile theft “has become a significant social problem, placing enormous economic and personal burdens upon the citizens of different States.”³¹⁷ By analogy, if the commission of fraud by consumer debtors is as frequent and common as it is believed to be, then it is equally appropriate to conclude that the failure of consumer debtors to disclose all of their distributable assets is a systemic national problem which places serious economic strains on private creditors, administrative agencies, the federal government, and local governments. If available figures are even remotely accurate, this could amount to a collective loss of \$1 billion a year.³¹⁸ This represents debtors who voluntarily file for bankruptcy protection to obtain the benefit of the discharge, but who also choose to improperly conceal assets from the reach of their creditors. Because of this loss of assets and the need for debtors to be candid in their bankruptcy disclosures, the federal government has a substantial interest in protecting the integrity of the bankruptcy law system from debtor fraud.

Moreover, a warrantless search of a debtor's residence is necessary to further the bankruptcy law regime of full disclosure and honest dealings. Despite the longstanding existence of both civil and criminal remedies to deter and punish debtor fraud, it is suspected that such conduct is a serious national problem.³¹⁹ Returning to *Burger*, the Court in that case concluded that the warrantless inspection of an automobile junkyard was necessary to further the New York statutory scheme because “a warrant requirement would interfere

316. *Burger*, 482 U.S. at 708.

317. *Id.*

318. Walsh, *supra* note 22, at A9.

319. See, e.g., Mary Jo Heston et al., *Bankruptcy Fraud: A Roundtable Discussion*, 6 AM. BANKR. INST. L. REV. 275, 278 (1998) (noting the existence of bankruptcy fraud and its increased sophistication over the past several decades); Mary Jo Heston, *The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions*, 6 AM. BANKR. INST. L. REV. 359, 359 (1998) [hereinafter Heston, *The Missing Link*] (noting that bankruptcy fraud “is a problem that affects all participants in the bankruptcy process”).

with the statute's purpose of deterring automobile theft accomplished by identifying vehicles and parts as stolen and shutting down the market in such items."³²⁰ This was so "[b]ecause stolen cars and parts often pass quickly through an automobile junkyard."³²¹ Thus, the Court observed that frequent and unannounced inspections were necessary to detect stolen parts.³²²

Again, analogy can be made to the bankruptcy law process. As the facts in *In re Bursztyn* demonstrate, it is notoriously easy for consumer debtors to hide assets from disclosure, most notably valuable items of personal property such as cash, jewelry, collectibles, artwork, stock certificates, and antiques. Moreover, like the automobile parts in *Burger*, an individual's personal property can be "passed quickly" and moved from location to location if one is determined to defraud creditors. Because of the mobility of most consumer debtor's assets, any advance warning of a forthcoming or requested inspection by the bankruptcy trustee could result in the "disappearance" of the assets and a resultant loss to creditors. For this reason, the *In re Barman* court's prescription that any motion by a bankruptcy trustee to search a debtor's home be filed upon notice to the debtor might prove to be an exercise in futility. Similar to *Burger*, an unannounced search would be crucial if the bankruptcy system is truly aimed at remedying the suspected widespread problem of debtor fraud.

Continuing the analogy, in order to satisfy the dictates of *Burger*, the bankruptcy law scheme must provide a constitutionally adequate substitute for a warrant. As mentioned above, no provision in the Bankruptcy Code currently exists that advises that a debtor's residence could be subject to a search by a bankruptcy trustee. However, if the concealment of assets is in fact a systemic problem, then Congress should amend the Bankruptcy Code to add that one of the debtor's duties is to permit a home inspection should the trustee have some suspicion that the debtor is harboring assets, or alternatively promulgate a provision in the Code that would alert a debtor in advance that a home search might be part of the financial affairs investigation.³²³

320. *Burger*, 482 U.S. at 710.

321. *Id.*

322. *Id.*; see also *Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (noting that requiring a warrant prior to searching a federally regulated underground mine would undercut statutory objectives "[i]n light 'of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained'" (citing S. REP. NO. 95-181, at 27 (1977), reprinted in 1977 U.S.C.C.A.N. 3401, 3427. But see *Diercks v. Wis. Dep't of Admin.*, No. 02-C-988, 2006 WL 3761333, at *7-8 (E.D. Wis. Dec. 20, 2006) (holding that the use of uninterrupted video surveillance of the defendants for two months did not meet the standard for random and unannounced inspections as articulated in *Burger*).

323. In addition to amending the Bankruptcy Code in these ways, Dickerson has suggested that Congress could also "revise the dischargeability provisions of the Bankruptcy Code to make the debtor's consent to a residential search a condition of discharge, thereby placing debtors on notice of the possibility that their homes may be searched." Dickerson, *supra* note 144, at 303. Such an approach, however, may run afoul of the doctrine of unconstitutional conditions. As expressed by Jane Rutherford, the doctrine of unconstitutional conditions "holds that the government cannot make an individual choose between getting a state conferred benefit and giving up a constitutional right." Jane Rutherford, *The*

Amending the Code in this way would apprise a debtor in advance that a residence search could possibly occur, and would alert a debtor that the search was being conducted pursuant to statute and not at the bald discretion of the bankruptcy trustee. Further, any revision to the Bankruptcy Code should also satisfy the requirement of a “properly defined scope” and limit the discretion of the bankruptcy trustee by only authorizing a search during normal business hours, in the debtor’s presence, and without forcible entry. Unlike a statute of the kind examined in *Burger*, any revision of the Bankruptcy Code should not provide that a trustee search could be made on a frequent or regular basis: preserving the diminished expectations of privacy in the home remains a countervailing governmental interest, and permitting repeated searches of a particular debtor’s home would be unduly abusive.

Finally, any amendment to the Bankruptcy Code providing for a statutory search of a debtor’s home would necessarily need to account for a related issue that has been the subject of dispute in the federal courts, namely, whether a bankruptcy court has the authority to issue a search warrant or inspection order involving a debtor’s residence.³²⁴ Simply stated, Congress would also need to include a provision in the Bankruptcy Code explicitly authorizing a bankruptcy court to issue an administrative search warrant.

It would be practical for the federal courts alternatively to carve out an exception to the Fourth Amendment warrant requirement—like the special needs exception—based upon the view that the bankruptcy law system is the equivalent of a closely regulated industry.

C. *Implied Consent to a Search of the Home*

A third theory by which a bankruptcy trustee could conduct a warrantless search of a debtor’s home is implied consent. Pursuant to the consent exception to the search warrant requirement, state actors may search private premises without a warrant “provided the individual whose property is searched freely and voluntarily consents to the search.”³²⁵ For a Fourth Amendment inquiry, the requisite consent can be implied by actions or conduct.³²⁶ It can be granted

Meek Shall Inherit the Earth: A Power-Based Theory of Unconstitutional Conditions on Religion, 72 DENV. U. L. REV. 909, 909 (1995).

324. See, e.g., *In re Application of Tr. in Bankr. for a Search Warrant*, 173 B.R. 341, 342 (N.D. Ohio 1994) (holding that a bankruptcy trustee is not authorized to obtain a warrant under Rule 41 of the Federal Rules of Criminal Procedure); see also *Spacone v. Burke (In re Truck-A-Way)*, 300 B.R. 31, 38 (E.D. Cal. 2003) (“Clearly the explicit requirements of Rule 41 reflect the exacting mandate of the Fourth Amendment and cannot be circumvented by the statutory structure created by the Bankruptcy Code.”). But see *Taunt v. Barman (In re Barman)*, 252 B.R. 403, 418 (Bankr. E.D. Mich. 2000) (authorizing the issuance of an inspection order to a bankruptcy trustee).

325. PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 269 (2005).

326. *Palmieri v. Kammerer*, 690 F. Supp. 2d 34, 42 (D. Conn. 2010) (citing *United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993)); see also *United States v. Taylor*, 722 F. Supp. 2d 937, 944

explicitly or tacitly.³²⁷ Whether an individual provides consent in a given instance is a factual question;³²⁸ the standard for measuring the scope of the consent is one of objective reasonableness under the totality of the circumstances.³²⁹

Due to the numerous obligations placed upon debtors when taking advantage of the bankruptcy process, and the countervailing duties imposed upon trustees to investigate debtors' financial affairs, it is valid and reasonable to conclude that under the totality of circumstances, debtors impliedly consent to searches of their residences when they voluntarily file for bankruptcy relief. As one commentator has argued: "By voluntarily submitting himself and his assets to the jurisdiction of the bankruptcy court, a debtor has a decreased expectation of privacy and the Fourth Amendment should not be an obstacle to the trustee's ability to perform his duties."³³⁰

The bankruptcy petition and accompanying schedules,³³¹ documents that every debtor must complete and file with the bankruptcy court under penalty of perjury,³³² serve as a foreshadowing of the intrusiveness of the bankruptcy process to every debtor. In exchange for an immediate automatic stay against most attempts by creditors to collect pre-petition debts,³³³ and the future possibility of obtaining a discharge of the debt, the required schedules cause the debtor to disclose all property and detailed personal information. As previously stated, the trustee is currently largely at the mercy of the debtor with regard to the disclosure of assets that are available for distribution to creditors.³³⁴ Because the bankruptcy system relies heavily on self-reporting, it provides "the opportunity for, and the lure of, fraud."³³⁵

Schedule A calls for the debtor to list and describe all real property held by the debtor, together with its current value and the amount of any secured

(W.D. Tenn. 2010) (noting that consent for Fourth Amendment purposes "can be in the form of words, gestures, or conduct").

327. Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. CIV. RTS. L.J. 261, 267 (2004).

328. *United States v. Kelley*, 594 F.3d 1010, 1013 (8th Cir. 2010).

329. *Palmieri*, 690 F. Supp. 2d at 42 (citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)).

330. Brandy L. Kurelich, Comment, *Bankruptcy and the Fourth Amendment: Should the Test be "Reasonable" or "Administrative?"*, 81 U. DET. MERCY L. REV. 31, 32 (2003). *But see* Taylor, *supra* note 144, at 628 (arguing that "surrendering the right to privacy is not a condition clearly incident to filing an individual bankruptcy petition as may be the case for a corporate debtor").

331. See 11 U.S.C. § 521(a)(1)(B) (2006).

332. See FED. R. BANKR. P. 1008.

333. See 11 U.S.C. § 362 (enumerating the types of creditor action that are stayed once a bankruptcy petition is filed).

334. *In re Beitzel*, 333 B.R. 84, 92 (Bankr. M.D.N.C. 2005) ("The importance of having a debtor submit complete and accurate bankruptcy schedules is paramount; the bankruptcy system relies heavily on self-reporting by debtors."); *see also* Heston, *The Missing Link*, *supra* note 319, at 364 ("Bankruptcy is predominantly a civil matter that relies heavily on self-reporting and voluntary disclosure.").

335. Heston, *The Missing Link*, *supra* note 319, at 360.

claims against the property.³³⁶ Schedule B requires the debtor to list, describe, and value all personal property, including, but not limited to, the following: cash on hand; deposit accounts; household goods and furnishings; wearing apparel; annuities; life insurance policies; interests in IRAs; stocks and bonds; alimony, maintenance, and support payments, if any; all types of vehicles; and any collectibles and hobby equipment.³³⁷ Schedules D through F necessitate the debtor to list the identity of all known creditors and the amounts owed to each.³³⁸ Schedule I requires a debtor to divulge a detailed account of income, including the reasons for any anticipated increase or decrease, and the identity of the debtor's employer.³³⁹ In addition, Schedule J requires a debtor to itemize and to calculate current monthly expenditures, including for such items as food, utilities, rent, medical expenses, and entertainment expenses.³⁴⁰ Schedule J also causes a debtor to identify and to calculate monthly net income. Finally, the "Statement of Financial Affairs" requires a debtor to divulge another set of personal information, including, but not limited to, any sources of additional income, any pending lawsuits or administrative proceedings involving the debtor, any repossessions or foreclosures occurring in the period preceding the bankruptcy filing, and the existence, location, and contents of any safe deposit boxes held by the debtor.³⁴¹ These documents, and all pleadings filed in a bankruptcy case, are available for unlimited inspection by the general public.³⁴²

Importantly, these documents contain information that enables a reviewer to construct a very concrete picture regarding the debtor's life conditions (assuming that the documents are accurate). That is, the documents describe what the debtor does for a living, where the debtor is employed, and how long the debtor has worked there. They also reveal the nature of the debtor's relationships with people by showing with whom the debtor lives.³⁴³ Furthermore, it illustrates the debtor's character and personality "by showing life circumstances such as what he reads, medical problems, where he spends his income, detailed cash flows, information on schooling, any businesses

336. See Official Bankruptcy Form 6A, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006A_1207f.pdf.

337. See Official Bankruptcy Form 6B, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006B_1207f.pdf.

338. See Official Bankruptcy Forms 6D, 6E & 6F, available at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

339. See Official Bankruptcy Form 6I, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006I_1207f.pdf.

340. See Official Bankruptcy Form 6J, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006J_1207f.pdf.

341. See Official Bankruptcy Form 7, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_007_0410.pdf.

342. See Obee & Plouffe, *supra* note 262, at 1068-69 ("The general public is afforded nearly unlimited access to records and proceedings in the main bankruptcy case.").

343. *Id.* at 1063.

entered into, lawsuits pending, and if and where he attends" any religious congregation.³⁴⁴

The foregoing is only the beginning of the process on the path toward discharge. Pursuant to § 521(a)(3) of the Bankruptcy Code, a debtor is required to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties" as laid out by § 704(a) of the Code.³⁴⁵ Quite significantly, § 704(a) prescribes the duties of a bankruptcy trustee, in part, as including an affirmative obligation to collect and to liquidate property of the estate for the benefit of creditors and to investigate the financial affairs of the debtor.³⁴⁶ Furthermore, § 521(a)(4) of the Code commands that a debtor surrender to the trustee all property of the estate,³⁴⁷ and pursuant to § 343 of the Code, within a reasonable time after commencing the bankruptcy case a debtor must submit to a financial examination by creditors in what is known as the § 341 "meeting of creditors."³⁴⁸ Because the § 341 meeting of creditors lasts for only a short period of time, a debtor can also be questioned about financial affairs and the whereabouts of the estate through a separate deposition-like process known as a Rule 2004 examination.³⁴⁹ Unlike a traditional deposition, however, a Rule 2004 examination is often described as a "fishing expedition,"³⁵⁰ and its avowed purpose "is to allow a trustee, or others interested in accomplishing the same ends, to discover and investigate how to bring to light possession of assets of the debtor which might be intentionally concealed or overlooked in ignorance or haste."³⁵¹ "In addition to the[se] bankruptcy specific discovery methods, parties may utilize the federal civil discovery rules during" certain proceedings by or against a debtor.³⁵²

The applicable Bankruptcy Code sections and procedural rules are designed so that the participants in the process can make intelligent, informed decisions based on fact rather than fiction. Indeed, the Bankruptcy Code "requires the fullest disclosure, the utmost good faith," and the surrender of all nonexempt assets of the debtor.³⁵³ But despite all of these investigatory techniques and voluntary disclosure requirements placed upon debtors, it is suggested that some individual debtors attempt to "play fast and loose with their assets or with the reality of their affairs."³⁵⁴ As one commentator has noted, when a debtor fails to live up to the affirmative obligations of disclosure

344. *Id.*

345. *See* 11 U.S.C. § 521(a)(3) (2006).

346. *See id.* § 704(a)(1), (4).

347. *See id.* § 521(a)(4).

348. *See id.* § 343; *see also* FED. R. BANKR. P. 2003 (calling for a meeting of creditors to examine the debtor).

349. *See* FED. R. BANKR. P. 2004.

350. *See, e.g., In re Valley Forge Plaza Assocs.*, 109 B.R. 669, 674 (Bankr. E.D. Pa. 1990).

351. *Id.*

352. Heston, *The Missing Link*, *supra* note 319, at 369.

353. *In re Breitling*, 133 F. 146, 148 (7th Cir. 1904).

354. *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987).

and candor, the debtor “undermines the implicit compromise that he strikes with creditors through the bankruptcy process: fair and efficient distribution of *all* assets in return for a discharge of his debts.”³⁵⁵

The *In re Barman* and *In re Bursztyn* courts correctly observed that nothing in the Bankruptcy Code explicitly imposes an obligation upon a debtor to permit a home inspection by a trustee without a court order,³⁵⁶ but the decisions incorrectly presume that nothing *implies* such ability to do so. That is, a fair reading of the debtor’s duties of cooperation³⁵⁷ and surrender, together with the trustee’s countervailing responsibilities to collect and to liquidate estate property and to investigate the financial affairs of the debtor, leads to the reasonable conclusion that upon the filing of a voluntary bankruptcy petition, a debtor impliedly consents to a home search for purposes of Fourth Amendment scrutiny. Indeed, without this ability of the trustee to verify the debtor’s disclosures and representations during the bankruptcy proceeding, “there is nothing to deter potential debtors from abusing the system by failing to disclose valuable assets.”³⁵⁸ The credibility and integrity of the entire bankruptcy system “is dependent on the ability of the trustee to verify the information in the schedules and uncover hidden assets.”³⁵⁹

While this result may appear unduly intrusive, two factors should help assuage any objections to this prescription. First, due to the sheer volume of Chapter 7 and Chapter 13 bankruptcy cases filed annually, along with a private trustee’s limited resources, a trustee would not likely exercise this power and act on this implied consent unless the trustee had serious cause to believe a debtor was improperly shielding assets. Second, while the debtor’s implied consent makes the obtaining of a warrant unnecessary, the search itself still must not be unreasonable under the Fourth Amendment. If a debtor challenged the reasonableness of a search after its occurrence, and a court concluded that a bankruptcy trustee violated the Reasonableness Clause, it is presumed that the trustee could be held liable for such a violation.

Consequently, the debtor’s act of voluntarily filing for bankruptcy relief, and the totality of circumstances underlying the nature of the bankruptcy process itself, leads to the justifiable conclusion that a consumer debtor implicitly consents to a home search for uncovering assets of the estate.

355. Nevin M. Gewertz, Comment, *Act or Asset? Multiplicitous Indictments Under the Bankruptcy Fraud Statute*, 18 U.S.C. § 152, 76 U. CHI. L. REV. 909, 911-12 (2009).

356. *Youngman v. Bursztyn (In re Bursztyn)*, 366 B.R. 353, 371 (Bankr. D.N.J. 2007); *Taunt v. Barman (In re Barman)*, 252 B.R. 403, 414 (Bankr. E.D. Mich. 2000).

357. As a noted treatise on bankruptcy law observes, “[c]ooperate is a broad term, . . . and must be construed that whenever the trustee calls upon the debtor for assistance in the performance of his duties, the debtor is required to respond, at least if the request is not unreasonable.” 4 COLLIER ON BANKRUPTCY ¶ 521.15[5] (16th ed. 2009).

358. Kurelich, *supra* note 330, at 49.

359. *Id.*

Conclusion

The bankruptcy process was designed to help only the “honest but unfortunate” class of debtors.³⁶⁰ And while the majority of debtors who file for bankruptcy protection appear to fit this description, a number of debtors attempt to reap the benefits of the bankruptcy process by failing to disclose or to turn over all of their distributable assets to the bankruptcy trustee, and, in turn, the court.

Bankruptcy fraud is a recurring, ongoing problem that affects not only the participants in the bankruptcy process but also society in general and the national economy.³⁶¹ And despite all of the available techniques to uncover unreported assets of the estate, it is estimated that tens of thousands of instances of bankruptcy fraud are committed each year.³⁶² To protect the integrity of the bankruptcy process, and to prevent and deter future fraudulent debtors, bankruptcy trustees must be afforded additional abilities to investigate and to expose suspected efforts of fraud.

To date, the Supreme Court has not permitted a warrantless administrative search of an individual’s residence unless commercial activity was conducted in the home or “the search was directed at convicted felons still serving sentences of probation or parole.”³⁶³ But as consumer bankruptcy filings continue to increase and the Department of Justice, through the Office of the U.S. Trustee, increases its efforts to uncover debtor fraud, the Supreme Court may in the future be called upon to decide whether a search of a debtor’s home, with or without a warrant, is constitutional under the Fourth Amendment.

The current civil and criminal remedies for the concealment of assets have not stopped debtors from committing fraud upon their creditors. Therefore, as an additional remedy to inhibit and to deter such abuse, a trustee should be authorized to conduct a warrantless search of a debtor’s home under one of the three alternative theories articulated in this Article. To that end, the bankruptcy trustee should be permitted only to conduct a search and to appraise any property found on the premises; a trustee should not be authorized to seize any property—primarily due to its potential exemption from the bankruptcy process—and no forcible entry should be allowed. Furthermore, because of the ease and speed with which debtors can move, hide, or transfer personal property, the search must be conducted without prior notice to the debtor. While arbitrariness and unconstrained discretion is the chief evil that the Fourth Amendment aims to prevent, the practical realities of bankruptcy would not lend themselves to such misuse. Due to the annual volume of filed consumer

360. Grogan v. Garner, 498 U.S. 279, 287 (1991).

361. Heston, *The Missing Link*, *supra* note 319, at 359 (“Bankruptcy fraud is a problem that affects all participants in the bankruptcy process.”).

362. See *supra* note 23 and accompanying text.

363. Anobile v. Pelligrino, 303 F.3d 107, 120 (2d Cir. 2002).

bankruptcy cases, trustees would most assuredly not exercise this power unless they had serious cause to believe a debtor was improperly shielding assets.

Bankruptcy law presents its own unique context, different from all other civil settings. The Bankruptcy Code attempts to harmonize the interests of debtors and creditors. However, the bankruptcy process is incredibly powerful, enabling individuals to shed burdensome debt to the detriment of their creditors. In order to realize this benefit, debtors must fully submit themselves and their assets to the court. As a condition of voluntarily choosing bankruptcy relief, debtors should expect intrusions into their privacy. And when there is evidence that a debtor is not being completely forthcoming and candid, the debtor should not be permitted to use the Fourth Amendment as a shield to further these destructive efforts.

